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## Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty

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## ABORIGINAL RIGHTS IN CANADA: FROM TITLE TO LAND TO TERRITORIAL SOVEREIGNTY

*Kent McNeil\**

Despite vacillations in policy from treaty acknowledgement of tribal sovereignty and land rights through removal, allotment, reorganization, termination and self-determination,<sup>1</sup> the doctrinal foundations of Indian law have been fairly well settled in the United States since the Marshall Court decisions of the 1820s and 1830s.<sup>2</sup> Not so in Canada, where the courts are only beginning to address some major Aboriginal rights issues.<sup>3</sup> Prominent among these are the issue of the nature of Aboriginal rights to land (commonly known as Aboriginal title), and the question of whether the Aboriginal peoples have an inherent right of self-government.<sup>4</sup> Typically, Canadian courts have approached Aboriginal title and self-government as distinct issues, to be decided in virtual isolation from one another.<sup>5</sup> This article will examine recent case law addressing these issues,

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1. For overviews, *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 47-206 (1982) [hereinafter COHEN'S HANDBOOK]; VINE DELORIA, JR., AND CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1-24 (1983).

2. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835).

3. The term "Aboriginal rights" is used in Canadian law to refer to the rights the Aboriginal peoples have as a result of their existence as peoples with distinctive cultures and traditions, and their occupation and use of lands prior to European colonization. The Aboriginal peoples are constitutionally defined to include "the Indian, Inuit and Métis peoples of Canada": Constitution Act, 1982 (being Schedule B to the Canada Act, 1982, (U.K.) 1982, c.11), s. 35 (2).

4. In the United States an inherent right of Indian self-government, in the form of tribal sovereignty, was acknowledged by Marshall C.J. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). This concept has been one of the foundations of Indian law ever since: *see generally* COHEN'S HANDBOOK, *supra* note 1, at 232-57; CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY (1987).

5. *See, e.g., Delgamuukw v. British Columbia* (1991) 79 D.L.R.4th 185 (B.C.S.C.), *reversed in part* (1993) 104 D.L.R.4th 470 (B.C.C.A.), *appeal allowed in part and new trial ordered* (1997) 153 D.L.R.4th 193.

and propose a conceptual framework for Aboriginal territorial rights that encompasses both Aboriginal title and self-government.

### I. THE NATURE OF ABORIGINAL TITLE

Ever since the 1888 decision of the Judicial Committee of the Privy Council<sup>6</sup> in *St. Catherine's Milling and Lumber Co. v. The Queen*,<sup>7</sup> Canadian law has acknowledged the existence of Aboriginal title to land. For the Privy Council, the source of that title was the Royal Proclamation of 1763,<sup>8</sup> by which the British Crown recognized and protected the rights of the Indian nations to the lands they occupied until they chose to dispose of them, in which case they could be purchased only by the Crown.<sup>9</sup> This provision for sale of Indian lands to the Crown formed the basis for the land surrender treaties in Canada, by which the Indian parties gave up some of their land rights in return for treaty rights.<sup>10</sup> However, when the

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6. Appeals from Canadian decisions could be taken to the Privy Council in London until 1933 in criminal cases, and 1949 in civil cases, when the Supreme Court of Canada became the final court of appeal. See JAMES G. SNELL AND FREDERICK VAUGHAN, *THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION 178-95* (1985).

7. (1888) 14 App. Cas. 46. Note that reliance on the *St. Catherine's* case as a precedent is problematic, given that the trial judge's factual findings were influenced by explicitly prejudicial attitudes towards Indians. See Donald Smith, *Aboriginal Rights a Century Ago: The St. Catherine's Milling Case of 1885 Hardened Attitudes Toward Native Land Claims*, 67:1 *THE BEAVER* 4 (1987); Anthony J. Hall, *The St. Catherine's Milling and Lumber Company versus the Queen: Indian Land Rights as a Factor in Federal-Provincial Relations in Nineteenth-Century Canada*, in KERRY ABEL AND JEAN FRIESEN, eds., *ABORIGINAL RESOURCE USE IN CANADA: HISTORICAL AND LEGAL ASPECTS* 267 (1991); Kent McNeil, *Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s*, in *JOURNAL OF THE WEST* (1999). See generally Catherine Bell and Michael Asch, *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation*, in MICHAEL ASCH, ed., *ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE* 38 (1997) [hereinafter *ABORIGINAL AND TREATY RIGHTS*], arguing that aspects of judicial decisions based on dated, ethnocentric attitudes should not be used as precedents in current Aboriginal rights litigation.

8. Reprinted in R.S.C. 1985, App. II, No. 1.

9. For detailed analysis of the Indian provisions of the Proclamation, see generally BRIAN SLATTERY, *THE LAND RIGHTS OF INDIGENOUS CANADIAN PEOPLES* 191-349 (1979). See also John Borrows, *Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation*, 28 *UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW* 1 (1994), using the historical context and Aboriginal understanding of the Proclamation to argue that it affirmed Aboriginal sovereignty as well as land rights.

10. Interpretation of the land surrender provisions in the treaties remains controversial, as Aboriginal people often assert that provisions that look like absolute surrenders on their face really distort the understanding of the parties that the lands would be shared. See *Re Paulette and Registrar of Titles* (No. 2) (1973) 42 D.L.R.3d 8 (N.W.T.S.C.), reversed on other grounds (1975) 63 D.L.R. 3d 1 (N.W.T.C.A.), sub nom. *Paulette v. The Queen* [1977] 2 S.C.R. 628; DELLA OPEKOKEW, *THE FIRST NATIONS: INDIAN GOVERNMENT AND THE CANADIAN CONFEDERATION* 9-13 (1980); RICHARD PRICE, ed., *THE SPIRIT OF THE ALBERTA INDIAN TREATIES* (1987); Patrick Macklem, *The Impact of Treaty 9 on Resource Development in*

Proclamation's connection with Aboriginal title was re-examined in 1973 by the Supreme Court of Canada in its landmark decision in *Calder v. Attorney-General of British Columbia*, the Court decided that Aboriginal title is an independent legal right that does not depend on the Proclamation for its existence.<sup>11</sup> That position was re-affirmed by the Supreme Court in *Guerin v. The Queen*, where Dickson J. concluded that the Indian "interest in their lands is a pre-existing legal right not created by Royal Proclamation ... or by any other executive act or legislative provision."<sup>12</sup>

An aspect of the *St. Catherine's* decision that has remained important is the Privy Council's pronouncement that Aboriginal title, while not amounting to a fee simple estate, is nonetheless an interest in land.<sup>13</sup> This must mean that it is proprietary in nature.<sup>14</sup> Delivering the Privy Council's opinion, Lord Watson described "the tenure of the Indians" as "a personal and usufructuary right", a description that has sometimes been misinterpreted to mean that their interest is non-proprietary.<sup>15</sup> However, as Lord Watson based that description on the words of the Royal Proclamation, which he regarded as the source of Aboriginal title, he could not have in-

*Northern Ontario*, in ABORIGINAL AND TREATY RIGHTS, *supra* note 7, 97 at 108-120; Sharon Venne, *Understanding Treaty 6: An Indigenous Perspective*, in ABORIGINAL AND TREATY RIGHTS, *supra* note 7, 173 at 192-202.

11. [1973] S.C.R. 313, per Judson J. at 322-23, 328, Hall J. (dissenting on other issues) at 394, 396-97.

12. [1984] 2 S.C.R. 335, 379. *See also* Delgamuukw v. British Columbia (1997) 153 D.L.R. (4th) 193, 242.

13. While declining to specify the precise nature of Aboriginal title, Lord Watson said that it was "an interest other than that of the Province" (of Ontario, where the land was located), and that that interest was a burden on the provincial Crown's underlying title to the land: *St. Catherine's Milling & Lumber Co. v. The Queen* (1888) 14 App. Cas. 46, 58 (P.C.). *See also* Haida Nation v. British Columbia (Minister of Forests) (1997) 153 D.L.R. 4th 1, where the British Columbia Court of Appeal relied on the *St. Catherine's* decision to hold unanimously that Aboriginal title is an encumbrance on the Crown's title, and can include rights to standing timber. *Compare* R. v. Paul (1998) 158 D.L.R. 4th 231 (N.B.C.A.).

14. *See* Kent McNeil, *The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket*, in MATT BRAY AND ASHLEY THOMSON, eds., *TEMAGAMI: A DEBATE ON WILDERNESS* 185, at 189-91 (1990). *Compare* Hamlet of Baker Lake v. Minister of Indian Affairs [1980] 1 F.C. 518, 577 (T.D.).

15. *See* Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1 (H.C. Aust.), per Deane and Gaudron JJ. at 88-89. For critical commentary on their interpretation, *see generally* Kent McNeil, *Racial Discrimination and Unilateral Extinguishment of Native Title*, 1 AUSTRALIAN INDIGENOUS LAW REPORTER 181, 205-07 (1996). *Compare* R. v. Paul (1997) 153 D.L.R. 4th 131, 174 (N.B.Q.B.) (*reversed* on the issue of the *existence* of the rights, (1998) 158 D.L.R. 4th 231 (N.B.C.A.)), where Turnbull J. concluded that

the Indians of New Brunswick do have land rights and that such are treaty rights. I believe it is like a usufructuary right. It does not matter what such rights are called. It is not a right restricted to personal use, but a *full blown right of beneficial ownership and possession* in keeping with the concept of this is our land - that is your land. [emphasis added]

tended it to apply to the Aboriginal title the Supreme Court has now found to pre-date that document.<sup>16</sup> Moreover, subsequent Privy Council and Supreme Court of Canada decisions have made clear that Aboriginal title is "a personal right in the sense that it is in its nature inalienable except by surrender to the Crown."<sup>17</sup> In *Canadian Pacific Ltd. v. Paul*, the Supreme Court rejected an interpretation of the *St. Catherine's* decision that "Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests."<sup>18</sup> The Court affirmed that Indian title "was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown."<sup>19</sup>

Until the recent decision of the Supreme Court in *Delgamuukw v. British Columbia*,<sup>20</sup> interpretation and modification of the *St. Catherine's* description of Aboriginal title failed to produce clear answers to questions of the title's nature. In an oft-quoted passage in *Calder v. Attorney-General of British Columbia*, Judson J. said:

the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right.'<sup>21</sup>

While this suggested that Aboriginal title stems from occupation of land prior to European colonization, the relevance of the fact that Aboriginal peoples were organized in societies was not explained.<sup>22</sup> It may be that Judson J.'s reference to this rather obvious fact was meant to support the Canadian judicial position that Aboriginal title is communal in nature,<sup>23</sup> but nothing in his judgment stated that explicitly.

In the *Guerin* case, Dickson J. said that the *Calder* decision "recog-

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16. See *supra* text accompanying notes 11-12.

17. Attorney-General for Quebec v. Attorney-General for Canada [1921] 1 A.C. 401, 408 (P.C.). See also *Guerin v. The Queen* [1984] 2 S.C.R. 335, 382.

18. [1988] 2 S.C.R. 654, 677.

19. *Id.* Lamer C.J. affirmed this aspect of *Canadian Pacific* in *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 241, reiterating that the "personal" description relates only to inalienability, and "does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests."

20. (1997) 153 D.L.R.4th 193.

21. [1973] S.C.R. 313, 328.

22. Compare Mark Walters, *British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia*, 17 QUEEN'S LAW JOURNAL 350, 407-09 (1992), arguing that the organized society dimension entails a continuity model of Aboriginal rights, based on the existence of Aboriginal legal systems prior to European colonization.

23. See also *infra* text accompanying notes 176-79.

nized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands."<sup>24</sup> He also referred to the principle, approved by the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*,<sup>25</sup> "that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants".<sup>26</sup> He went on to review Canadian decisions dealing with Aboriginal title and the Indian interest in reserve lands (which he regarded as the same), and said that the *St. Catherine's* description of that title as a "personal and usufructuary right" and other judicial descriptions of the Indian interest in reserve lands as a "beneficial interest" each contain a "core of truth".<sup>27</sup> However, in his view the problems in defining the title stem from the use of terms drawn from general property law that do not entirely fit the "*sui generis* interest which the Indians have."<sup>28</sup> He concluded that the Indian interest in Aboriginal and reserve lands is

best characterized by its general inalienability [other than by surrender to the Crown], coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.<sup>29</sup>

With all due respect, this description was not particularly helpful, as it told us nothing about the nature of Aboriginal title apart from affirming the well-established rule that it is generally inalienable.<sup>30</sup>

This brings us to the pivotal case of *Delgamuukw v. British Columbia*,<sup>31</sup> in which the Gitksan and Wet'suwet'en peoples asked for a declaration acknowledging both their title to their territories and the authority of their traditional governments to exercise jurisdiction over those territories and their peoples.<sup>32</sup> At trial, McEachern C.J. held that any

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24. *Guerin v. The Queen* [1984] 2 S.C.R. 335, 376.

25. [1921] 2 A.C. 399.

26. *Guerin v. The Queen* [1984] 2 S.C.R. 335, 378.

27. *Id.* at 379-82.

28. *Id.* at 382.

29. *Id.*

30. The same rule applies to Indian title in the United States: see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). For analysis and criticism of the rule, see KENT MCNEIL, *COMMON LAW ABORIGINAL TITLE* 221-35 (1989). Note that the second part of Dickson J.'s description of Indian title relates to the imposition of a fiduciary duty on the Crown when Indian lands are surrendered: for detailed discussion, see LEONARD IAN ROTMAN, *PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA* (1996). While that aspect of his description is vitally important (especially as the duty was established for the first time in Canadian law in *Guerin*), it does not assist us in determining the nature of Aboriginal title.

31. (1991) 79 D.L.R. 4th 185 (B.C.S.C.), *reversed in part* (1993) 104 D.L.R.(4th) 470 (B.C.C.A.), *appeal allowed in part and new trial ordered* (1997) 153 D.L.R.4th 193.

32. *Id.* In effect, the Gitksan and Wet'suwet'en were requesting recognition of their territo-

Aboriginal land rights and governmental powers the Gitksan and Wet'suwet'en may have had prior to European colonization had been extinguished by the time British Columbia joined Canada as its sixth province in 1871.<sup>33</sup> The British Columbia Court of Appeal agreed by a majority of three to two that the governmental authority of those peoples had been extinguished (we will return to this issue in Part 2 below), but held that their Aboriginal land rights had not been extinguished, as the Crown had not met the onus of proving extinguishment by clear and plain legislative intent.<sup>34</sup> Given this holding, those rights would have been in existence and would have received constitutional protection in 1982 by section 35(1) of the *Constitution Act, 1982*,<sup>35</sup> which provides: "35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."<sup>36</sup>

As the Court of Appeal upheld the Aboriginal land rights of the Gitksan and Wet'suwet'en peoples in *Delgamuukw*, the nature of those rights became an issue. The judges did not actually resolve this matter, as the parties agreed to try to settle it by negotiation. Nonetheless, the judges did express some general opinions on the nature of Aboriginal land rights.<sup>37</sup>

Macfarlane J.A. (Taggart J.A. concurring), in the leading majority judgment, regarded those rights as variable from one Aboriginal society to

rial and sovereign rights much like the recognition accorded to the Cherokee Nation by the United States Supreme Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

33. For commentary on this decision, see generally Walters, *supra* note 22; FRANK CASSIDY, ed., *ABORIGINAL TITLE IN BRITISH COLUMBIA: DELGAMUUKW V. THE QUEEN* (1992).

34. *Delgamuukw v. British Columbia* (1993) 104 D.L.R. 4th 470, 519-39, 589-93, 595, 660-89, 724-30, 753-54, 761-64. The "clear and plain" test for extinguishment of Aboriginal rights was articulated by Hall J. (dissenting) in *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, 404, and adopted by the Supreme Court of Canada in *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1099; see also *R. v. Gladstone* [1996] 2 S.C.R. 723, 748-751; *R. v. Adams* [1996] 3 S.C.R. 101, 129-30; *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 270-71.

35. Schedule B to the Canada Act, 1982, (U.K.) 1982, c.11.

36. While section 35(1) protects Aboriginal and treaty rights from infringement by federal and provincial legislation and executive action, that protection is not absolute. Constitutional amendment aside, those rights can no longer be extinguished without the consent of the Aboriginal peoples (unlike in the United States, where Congress has "plenary" power in this regard: see COHEN'S HANDBOOK, *supra* note 1, at 217-220; WILKINSON, *supra* note 4, at 78-82), but they can still be infringed by federal and provincial legislation if the infringement is justified by proof of a valid legislative objective and consistency with the Crown's fiduciary duty to the Aboriginal peoples: see *R. v. Sparrow* [1990] 2 S.C.R. 1075; *R. v. Badger* [1996] 1 S.C.R. 771; *R. v. Gladstone* [1996] 2 S.C.R. 723; *R. v. Côté* [1996] 3 S.C.R. 139; *Delgamuukw v. British Columbia* (1997) 153 D.L.R. 4th 193. Although the issues of infringement and justification are of vital importance in Canadian Aboriginal rights law, this article will only touch on them briefly in the context of the connection between Aboriginal title and self-government: see *infra* text accompanying notes 199-210.

37. For detailed analysis of this aspect of the judgments, see Kent McNeil, *The Meaning of Aboriginal Title*, in *ABORIGINAL AND TREATY RIGHTS*, *supra* note 7, at 135.

another, depending on "patterns of historical occupancy and use of land."<sup>38</sup> Moreover, for him Aboriginal rights are based on traditions and practices that were "integral to the distinctive culture of the aboriginal society" prior to European acquisition of sovereignty; a practice "which became prevalent as a result of European influences would not qualify for protection as an aboriginal right."<sup>39</sup>

Wallace J., in his concurring majority judgment, expressed the view that Aboriginal rights are "site and activity specific".<sup>40</sup> Like Macfarlane J.A., he said they "reflect the traditional practices which were integral to the native society occupying tribal lands when the common law was introduced."<sup>41</sup> In his opinion, Aboriginal title "may range from an exclusive and plenary beneficial interest over certain parcels of land, to occasional presence for sustenance activities. A host of practices fall within the category including fishing, hunting and gathering."<sup>42</sup>

Lambert J.A., dissenting in part, took a somewhat different approach to the temporal aspect of Aboriginal land rights. While agreeing that "[t]hose rights must have their origin in a custom, tradition or practice of the aboriginal society which preceded settlement and sovereignty and which formed an integral part of their distinctive culture,"<sup>43</sup> he went on to say that "aboriginal rights are evolving rights. They are not frozen at the time of sovereignty or at any other time. The evolution which occurred before sovereignty and the evolution which occurred after sovereignty are both relevant to an understanding of the rights."<sup>44</sup> Like Wallace J.A., he also thought there could be different sorts of Aboriginal land rights, depending on the degree of connection with or use of the land. If an Aboriginal people established exclusive occupation, apparently they would have "an encompassing and general right" that would carry with it "the right to enjoy the fruits of the land including the game."<sup>45</sup> In that case,

taking game is not the right in question. Taking game is just a way of exercising a broader right to the exclusive occupation, possession, use and enjoyment of land. The situation would be different if the aboriginal practice was to hunt

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38. *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, 496.

39. *Id.* at 492-97.

40. *Id.* at 572. In *Haida Nation v. British Columbia (Minister of Forests)* (1997) 153 D.L.R. 4th 1, 17-18, Esson J.A. said that Aboriginal title claims are "fact and site specific" and can include a right to standing timber.

41. *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, 571.

42. *Id.* at 573.

43. *Id.* at 647.

44. *Id.* at 648. While Lambert J.A. did not specify how Aboriginal rights might evolve after acquisition of sovereignty by the Crown, he apparently linked this to a continuing right of self-government, which the Aboriginal peoples can exercise to change their customs, traditions and practices: see McNeil, *supra* note 37, at 147-48.

45. *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, 648.



game on land to which no exclusive occupation was claimed. If the aboriginal right was limited to a particular season, and a particular purpose, then the contemporary exercise of that right could be limited also in the same way, even though modern tools could be used in the exercise of the right.<sup>46</sup>

Hutcheon J. also dissented in part in *Delgamuukw*, but had little to say about the nature of Aboriginal title. On that issue, he simply listed the characteristics of Aboriginal land rights that were not in dispute - namely, that they extend to the Aboriginal people's traditional territory, are collective, and are inalienable except to the Crown.<sup>47</sup> To this, he added that they "are of such a nature as to compete on an equal footing with proprietary interests."<sup>48</sup>

The decision of the British Columbia Court of Appeal in *Delgamuukw* was appealed to the Supreme Court of Canada. The Supreme Court's decision, handed down on December 11, 1997,<sup>49</sup> is a landmark in Canadian Aboriginal rights jurisprudence. In it, the Court overturned the decision of the Court of Appeal and ordered a new trial, as the pleadings did not correspond with the actual claims that were made on appeal, and the trial judge applied incorrect principles in assessing the oral histories of the Gitksan and Wet'suwet'en peoples. Nonetheless, in delivering the leading judgment of the Supreme Court, Lamer C.J. took the time to lay down some vital principles of law to guide the judge at the new trial.<sup>50</sup> In particular, he provided direction on the use of oral histories, the content and proof of Aboriginal title, and federal and provincial powers over Aboriginal rights. However, the claim to a right of self-government was remitted to trial without further guidance from the Court, as the complexity of the issues and the lack of adequate submissions on them led Lamer C.J. to conclude that "this is not the right case for the Court to lay down the legal principles to guide future litigation" on self-government.<sup>51</sup>

In this article, my assessment of the Supreme Court's decision in *Delgamuukw* will be directed mainly at Lamer C.J.'s comments on the content

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46. *Id.*

47. *Id.* at 756-57.

48. *Id.* at 756. See also *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654, discussed *supra* in text accompanying notes 18-19.

49. *Delegamuukw v. British Columbia* (1997) 153 D.L.R.4th 193.

50. Lamer C.J.'s judgment was concurred in by Cory and Major JJ. La Forest J., L'Heureux-Dubé J. concurring, delivered a separate judgment, in which he agreed with Lamer C.J.'s disposition of the case, as well as with his views on federal and provincial powers, while taking a somewhat more restrictive approach to the content of Aboriginal title. McLachlin J. stated: "I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest." *Id.* at 284.

51. *Id.* at 266. On self-government, La Forest J. agreed with Lamer C.J., that "there was insufficient evidence before this Court to make any determination regarding this aspect of the appellants' claim." *Id.* at 284.

and proof of Aboriginal title. But before undertaking that assessment, it is important to look at other relevant developments in Aboriginal rights law that took place in the four year interval between the decisions of the Court of Appeal and the Supreme Court in that case. In particular, we need to consider the impact of three Supreme Court of Canada decisions involving Aboriginal fishing rights that were handed down in 1996.

The first of these, *R. v. Van der Peet*,<sup>52</sup> involved a claim by Dorothy Van der Peet, a member of the Sto:lo nation in British Columbia, that her Aboriginal right to fish included a right to exchange the fish she caught for money or other goods. In his majority judgment, Lamer C.J. formulated a test for determining how the Aboriginal rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, are to be identified and defined. Revealing the influence of the British Columbia Court of Appeal,<sup>53</sup> he stated the test in these terms: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."<sup>54</sup> Lamer C.J. then went on to specify the time period for application of this "integral to the distinctive culture" test:

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s.35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.<sup>55</sup>

Applying that test to Dorothy Van der Peet's claim, Lamer C.J. found that exchange of fish for money or other goods had not been an integral part of the Sto:lo people's distinctive culture before Europeans arrived, and so she did not have an Aboriginal right to engage in that activity.

In the course of his judgment in *Van der Peet*, Lamer C.J. elaborated on the integral to the distinctive culture test by presenting guidelines for its application. The first thing that must be taken into account is the perspective of the Aboriginal people claiming the right. However, he qualified this by stating that "that perspective must be framed in terms cognizable to the

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52. [1996] 2 S.C.R. 507.

53. In addition to the *Delgamuukw* decision, discussed *supra* in text accompanying notes 39-43, see *R. v. Van der Peet* [1993] 5 W.W.R. 459 (B.C.C.A.), the decision that was appealed to the Supreme Court. See also *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1099.

54. *R. v. Van der Peet* [1996] 2 S.C.R. 507, 549.

55. *Id.* at 554-55. Compare *L'Heureux-Dubé* and *McLachlin JJ.*'s dissenting opinions at 596-602, 633-36.

Canadian legal and constitutional structure.”<sup>56</sup> This is because “one of the fundamental purposes of s.35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty,” and “the only fair and just reconciliation is ... one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law.”<sup>57</sup>

With those perspectives in mind, a court should identify the nature of the claimed right, and proceed to determine whether the practice, custom or tradition alleged to support it was “a central and significant part of the society’s distinctive culture ... - that it was one of the things that truly *made the society what it was*.”<sup>58</sup> However, while the practice, custom or tradition must be *distinctive* in that it is a defining and central attribute of the society (rather than just an incidental or occasional aspect), it does not have to be *distinct* in the sense of being unique to that particular society.<sup>59</sup>

In addition to proving that the practice, custom or tradition was integral to their distinctive culture prior to European contact, to have an existing Aboriginal right the Aboriginal claimants also have to show continuity with a present-day practice, culture or tradition.<sup>60</sup> Lamer C.J. cautioned that this requirement of continuity should be applied flexibly to prevent the rights “from being frozen in pre-contact times.”<sup>61</sup> He wrote that “[t]he evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.”<sup>62</sup>

Lamer C.J.’s formulation of the integral to the distinctive culture test and his time frame for its application were criticized by L’Heureux-Dubé and McLachlin JJ. in their dissenting opinions in *Van der Peet*. They disagreed with his approach to defining those rights, which they regarded as too particularized. They favored a generic approach that would seek to identify the rights more broadly, rather than focus on specific practices relating to the exercise of those rights. L’Heureux-Dubé J. put it this way:

s.35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the ‘distinctive culture’ of which aboriginal activities are manifestations. Simply put, the emphasis would be on the *significance* of these activities to natives rather than on the activities themselves.<sup>63</sup>

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56. *Id.* at 550.

57. *Id.* at 550-51.

58. *Id.* at 553 (Lamer C.J.’s emphasis).

59. *Id.* at 553, 560-61.

60. *Id.* at 556.

61. *Id.* at 557.

62. *Id.*

63. *Id.* at 593 (L’Heureux-Dubé J.’s emphasis).

McLachlin J. found it

necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms.... The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.<sup>64</sup>

She went on to express her agreement with L'Heureux-Dubé J.

that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.<sup>65</sup>

With respect to Lamer C.J.'s time frame for application of the test, their criticism was even more pointed. L'Heureux-Dubé J. characterized his use of a pre-contact time frame as a "frozen right" approach, which "implies that aboriginal culture was crystallized in some sort of 'aboriginal time' prior to the arrival of Europeans."<sup>66</sup> She observed that Lamer C.J.'s approach "assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization."<sup>67</sup> Moreover, she found the date to be difficult to determine, arbitrary, and inconsistent with Aboriginal perspectives on the effect of the arrival of Europeans. She also thought that the test "imposes a heavy and unfair burden [of proof] on the natives", and that it "embodies inappropriate and unprovable assumptions about aboriginal culture and society."<sup>68</sup> In place of Lamer C.J.'s "frozen right" approach, L'Heureux-Dubé J. favored a "dynamic right" approach, by which Aboriginal rights would be "interpreted flexibly so as to permit their evolution over time."<sup>69</sup> In her view,

aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s.35(1)

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64. *Id.* at 631.

65. *Id.* at 632.

66. *Id.* at 596.

67. *Id.* at 597.

68. *Id.* at 597-98.

69. *Id.* at 599 (quoting *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1093).

would ensure their continued vitality.<sup>70</sup>

L'Heureux-Dubé J. concluded that as long as an activity had been an integral part of a distinctive Aboriginal culture for a "substantial continuous period of time" - which for her meant from 20 to 50 years - it should be protected as an Aboriginal right.<sup>71</sup>

While McLachlin J. was not prepared to go as far as L'Heureux-Dubé J. on this issue, she did not agree with Lamer C.J.'s view "that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question."<sup>72</sup>

So for McLachlin J., "the better question is what [aboriginal] laws and customs held sway before superimposition of European laws and customs."<sup>73</sup> As an example, she pointed to the situation in parts of Western Canada where

over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights.<sup>74</sup>

Commentators on the *Van der Peet* decision have echoed the concerns of L'Heureux-Dubé and McLachlin JJ., and added objections of their own.<sup>75</sup> Conferring authority on non-Aboriginal judges to decide what is

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70. *Id.* at 599-600. Note that L'Heureux-Dubé J.'s "generous, large and liberal" interpretation of Aboriginal rights is amply supported by case law: *see, e.g.,* *Simon v. The Queen* [1985] 2 S.C.R. 387, 402 (regarding treaty rights); *R. v. Horseman* [1990] 1 S.C.R. 901, 906-08, 930 (regarding earlier constitutional protections for hunting and fishing rights); *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1106-08 (regarding s.35(1)). In fact, Lamer C.J. also affirmed and purported to apply this principle of interpretation in *R. v. Van der Peet* [1996] 2 S.C.R. 507, 536-37 (though how he reconciled it with his narrow, time-orientated conception of Aboriginal rights is difficult to understand).

71. *R. v. Van der Peet* [1996] 2 S.C.R. 507, 601-02.

72. *Id.* at 634.

73. *Id.* at 635.

74. *Id.*

75. See John Borrows, *The Trickster: Integral to a Distinctive Culture*, 8:2 CONSTITUTIONAL FORUM 27 (1997); Leonard I. Rotman, *Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet*, 8:2 CONSTITUTIONAL FORUM 40 (1997); Kent McNeil, *Reduction by Definition: The Supreme Court's Treatment of Aboriginal Rights in 1996*, 5: 3, 4 CANADA WATCH 60 (1997); Kent McNeil, *Aboriginal Title and Aboriginal Rights: What's the Connection?*, 36 ALBERTA LAW REVIEW 117 (1997) [hereinafter *Aboriginal Title and Aboriginal Rights*]; Janice Gray, *O Canada! - Van der Peet as Guidance on the Construction of Native Title Rights*, 2 AUSTRALIAN

integral to the distinctive cultures of Aboriginal societies is obviously problematic, given the potential for cultural misunderstanding and bias.<sup>76</sup> Also, while Lamer C.J. said that Aboriginal perspectives have to be taken into account, his test for identifying and defining Aboriginal rights does not appear to do so, as Aboriginal peoples generally would be unlikely to accept his historically-based definition of "Aboriginal."<sup>77</sup> Related to this is the criticism that Lamer C.J.'s time-orientated approach to Aboriginal rights is based on a misguided, static conception of cultures that does not take account of the dynamic nature of human societies. His approach compels Aboriginal peoples to choose either to live in the past in order to preserve their Aboriginal rights, or to adapt to modern Canadian life and forgo those rights. As the former is not a viable option, Lamer C.J.'s approach is bound to lead to a loss of Aboriginal rights and eventual assimilation.

The other recent Supreme Court of Canada decisions that are relevant to our discussion of the nature of Aboriginal title are *R. v. Adams*<sup>78</sup> and *R. v. Côté*,<sup>79</sup> both of which involved Aboriginal fishing rights in the province of Quebec. While these decisions did not involve Aboriginal title as such, they are nonetheless pertinent because the Supreme Court made important pronouncements in them on the connection between Aboriginal title and Aboriginal rights generally.<sup>80</sup> In both cases, the Court had to decide whether Aboriginal rights are necessarily based on Aboriginal title so that an Aboriginal right to fish cannot exist apart from Aboriginal title to the land where the fishing takes place. The Court answered this question in each case by deciding that an Aboriginal right to fish can exist as a free-standing right independently of Aboriginal title, as that title is just one subset of the larger category of Aboriginal rights. In so doing, Lamer C.J., who delivered the principal judgment in each case, relied on the *Van der Peet* test for identifying and defining Aboriginal rights. In *Adams*, he said:

What this test, along with the conceptual basis which underlies it, indicates, is that while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aborigi-

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INDIGENOUS LAW REPORTER 18 (1997); Kelly Gallagher-Mackay, *Interpreting Self-Government: Approaches to Building Cultural Authority* [1997] 4 CANADIAN NATIVE LAW REPORTER 1; Russel Lawrence Barsh and James Youngblood Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand*, 42 MCGILL LAW JOURNAL 993 (1997).

76. See generally CASSIDY, *supra* note 33, especially Robin Ridington, *Fieldwork in Courtroom 53: A Witness to Delgamuukw* 206, and Michael Asch, *Errors in Delgamuukw: An Anthropological Perspective* 221 (commenting on lack of cross-cultural understanding by the trial judge in the *Delgamuukw* case).

77. For an Aboriginal perspective on this, see Borrows, *supra* note 75.

78. [1996] 3 S.C.R. 101.

79. [1996] 3 S.C.R. 139.

80. For more detailed discussion, see *Aboriginal Title and Aboriginal Rights*, *supra* note 75.

nal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to Aboriginal title to the land.<sup>81</sup>

In *Adams* and *Côté* the Supreme Court therefore clarified an issue that had been left unclear in the British Columbia Court of Appeal decision in *Delgamuukw*, namely whether specific Aboriginal rights such as a right to fish amount to a form of Aboriginal title.<sup>82</sup> The *Adams* and *Côté* decisions reveal that they do not, as those rights can exist on their own, independently of Aboriginal title. From those decisions, it appears that a free-standing Aboriginal right to fish and Aboriginal title to land are conceptually different: the former involves a right to *pursue an activity on the land*, whereas the latter involves a right *to the land itself*. In the case of a claim to a free-standing right such as a fishing right, the *Van der Peet* test applies to determine whether the right is supported by a practice, custom or tradition that was integral to the distinctive culture of the Aboriginal society prior to contact with Europeans. However, the relevance of that test to a claim to Aboriginal title was left uncertain by the *Adams* and *Côté* decisions.<sup>83</sup>

We can now return to the Supreme Court's decision in *Delgamuukw*, where the issue of the application of the *Van der Peet* test to an Aboriginal title claim was dealt with directly by Chief Justice Lamer. He began his discussion of Aboriginal title by addressing the long-lasting controversy over its content, a controversy revealed in the opposing positions of the parties:

The appellants [representing the Gitksan and Wet'suwet'en peoples] argue that aboriginal title is tantamount to an inalienable fee simple, which confers on aboriginal peoples the rights to use those lands as they choose and which has

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81. *R. v. Adams* [1996] 3 S.C.R. 101, 117-18 (Lamer C.J.'s emphasis). See also *R. v. Côté* [1996] 3 S.C.R. 139, 166-67.

82. See *supra* text accompanying notes 42, 45-46.

83. For discussion, see *Aboriginal Title and Aboriginal Rights*, *supra* note 75 (arguing that the *Van der Peet* test, if applied to Aboriginal title, should only be used to determine the *existence* of that title, and then only with modifications; it should not be used to determine the *content* of the title, as that would be inconsistent with Aboriginal perspectives, violate common law principles and precedents, and be discriminatory).

been constitutionalized by s. 35(1). The respondents [the governments of British Columbia and Canada] offer two alternative formulations: first, that aboriginal title is no more than a bundle of rights to engage in activities which are themselves aboriginal rights recognized and affirmed by s.35(1), and that the *Constitution Act, 1982*, merely constitutionalizes those individual rights, not the bundle itself, because the latter has no independent content; and second, that aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves, and that s.35(1) constitutionalizes this notion of exclusivity.<sup>84</sup>

Lamer C.J. rejected both these arguments, and held that "[t]he content of aboriginal title, in fact, lies somewhere in between these positions."<sup>85</sup>

Lamer C.J. relied on his decision in *Adams* to reject the respondents' argument that Aboriginal title is simply a collection of free-standing Aboriginal rights, with no independent content. In this regard, he said that, "although aboriginal title is a species of aboriginal right recognized and affirmed by s.35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land 'was of a central significance to their distinctive culture.'"<sup>86</sup> He did not, however, apply the *Van der Peet* test to determine the content of Aboriginal title. He stated:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies.<sup>87</sup>

Relying on *Adams*, Lamer C.J. viewed Aboriginal rights as lying along a spectrum, their location thereon being dependent on degree of connection with the land. At one end are free-standing Aboriginal rights which are aspects of practices, customs and traditions integral to the group's distinctive culture, but which are not connected with any particular land. In the middle are site-specific Aboriginal rights which are related to particular land but do not involve a sufficient connection to support title; they also need to meet the integral to the distinctive culture test laid down in *Van der Peet*. Finally,

[a]t the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of

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84. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 240.

85. *Id.*

86. *Id.* at 251 (quoting *R. v. Adams* [1997] 3 S.C.R. 101, 117-118).

87. *Id.* at 240-41.



distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. *What aboriginal title confers is the right to the land itself.*<sup>88</sup>

Lamer C.J. found support for his position "that the uses to which lands held pursuant to aboriginal title can be put [are] not restricted to the practices, customs and traditions of aboriginal peoples integral to distinctive aboriginal cultures"<sup>89</sup> in Canadian case law, especially *Guerin v. The Queen*, where Dickson J. held that the Indian interest in Aboriginal title land and reserve land is the same.<sup>90</sup> As the Indian interest in reserves is not restricted to traditional uses, entailing instead a broad right to use the lands for a variety of purposes in accordance with the present-day needs of reserve communities, Aboriginal title must be just as extensive.<sup>91</sup> Moreover, case and statute law indicate that the Indian interest in reserves includes subsurface as well as surface rights, so Aboriginal title does as well, encompassing mineral rights and oil and gas exploitation, even if these were not traditional uses of the lands.<sup>92</sup>

However, as mentioned earlier, Lamer C.J. also rejected the appel-

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88. *Id.* at 251-52 (emphasis added).

89. *Id.* at 243-44.

90. [1984] 2 S.C.R. 335, 379.

91. See *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 244-45. For more detailed discussion, see McNeil, *supra* note 37, at 148-51.

92. See *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 245, relying especially on *Blueberry River Indian Band v. Canada* (Department of Indian Affairs and Northern Development) [1995] 4 S.C.R. 344 (holding the federal government liable for breach of its fiduciary duty in relation to surrender of mineral rights on a reserve), and the Indian Oil and Gas Act, R.S.C. 1985, c. I-7, s.6(2) (providing that nothing in that Act precludes Indian people from negotiating for oil and gas benefits in areas where their Aboriginal land claims have not been settled). Though Lamer C.J. did not refer to American law in this context, this aspect of his decision is fully supported by decisions in the United States, where the courts have held that, in valuing Indian land for the purpose of paying compensation, it makes no difference whether the land is held by original Indian title, or is land specifically reserved by treaty or otherwise; in both cases, the value of the land is the same as it would be if the Indians held the fee simple, and includes the value of both surface and subsurface resources: see *United States v. Shoshone Tribe*, 304 U.S. 111, 115-18 (1938); *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 122-123 (1938); *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926, 942 (1959); *United States v. Northern Paiute Nation*, 393 F. 2d 786, 796 (1968). In *Otoe and Missouri Tribe v. United States*, 131 F. Supp. 265 (1955), *certiorari denied* 350 U.S. 848 (1955), Littleton J. for the Court of Claims, at 290-1, expressly rejected the argument that the land be valued in accordance with the use the Indians made of it; instead, appropriate factors to be considered were "the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation - considering the ready markets at that time and the potential market." In rejecting "the 'subsistence' approach advocated by the Government", he said: "Values cannot be determined on the basis of berries and wild fruits." See also *United States ex rel. Chunie v. Ringrose*, 788 F. 2d 638, 642 (1986), where Fletcher J. for the Ninth Circuit Court of Appeals wrote: "Aboriginal title entitles the tribes to full use and enjoyment of the surface and mineral estate, and to resources, such as timber, on the land."

lants' argument that "aboriginal title is tantamount to an inalienable fee simple."<sup>93</sup> He affirmed the description of Aboriginal title in earlier cases as a *sui generis* interest in land,<sup>94</sup> and placed a limitation on it, stemming from the second branch of what he regarded as its dual source. He said that:

aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.<sup>95</sup>

Later in his judgment, Lamer C.J. said that "the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law."<sup>96</sup> In the common law, occupation of land is proof of possession in law, giving rise to a legal estate.<sup>97</sup> However, one of the reasons why Aboriginal title is "*sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward."<sup>98</sup> Apparently this is also a reason why Aboriginal title is not tantamount to an inalienable fee simple.<sup>99</sup>

Lamer C.J. found a connection between the second branch of the source of Aboriginal title, that is, Aboriginal perspectives, including Aboriginal systems of law, and the need to maintain an Aboriginal community's relationship with the land. In his view, this places an inherent limitation on Aboriginal title that prevents the lands from being "put to such uses as may be irreconcilable with the nature of the occupation of that land and

93. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 240; see *supra* text accompanying notes 84-85.

94. *Id.* at 241-42, 246, 248. See also *Guerin v. The Queen* [1984] 2 S.C.R. 335, 382; *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654, 678; *Roberts v. Canada* [1989] 1 S.C.R. 322, 337; *Opetchesaht Indian Band v. Canada* [1997] 2 S.C.R. 119, 138-40; *St. Mary's Indian Band v. Cranbrook (City)* [1997] 2 S.C.R. 657, 666-68.

95. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 246-47.

96. *Id.* at 255.

97. *Id.* at 242. See generally McNEIL, *supra* note 30.

98. See *Delgamuukw v. British Columbia* (1997) 153 D.L.R. 4th 193, 242 (Lamer C.J.'s emphasis). Other features of Aboriginal title identified by Lamer C.J. that make it *sui generis* are its inalienability other than by surrender to the Crown, and its communal nature: *id.* at 241-42. For possible exceptions to the general rule that fee simple estates arise after assertion of British sovereignty, see discussion of land titles in British Honduras (now Belize) and Pitcairn Island in McNEIL, *supra* note 30, at 141-60.

99. Compare the American cases cited *supra* note 92.

the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place."<sup>100</sup> One of his concerns appears to be with the preservation of Aboriginal cultures, which might be undermined if Aboriginal lands are used in ways that do not respect Aboriginal peoples' special relationships with the land.<sup>101</sup> But he was careful to point out that this does not mean that Aboriginal title is limited to historic uses. He said that the limitation

arises from the particular physical and cultural relationship that a group may have with the land and is defined by the source of aboriginal title over it. This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal strait-jacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.<sup>102</sup>

Therefore the limitation is a culturally-based internal limitation that can vary from one Aboriginal group to another,<sup>103</sup> and perhaps from one parcel of land to another under the same Aboriginal title. This interpretation is supported by Lamer C.J.'s examples. If Aboriginal title arises from

occupation [that] is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip-mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).<sup>104</sup>

This raises the question, which Lamer C.J. did not answer, of whether an Aboriginal community, by altering its culture and hence its uses of the land, can modify the inherent limitation on its title. In the first example

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100. See *Delgamuukw v. British Columbia* (1997) 153 D.L.R. 4th 193, 247.

101. *Id.*, where Lamer C.J. stated that an Aboriginal community's relationship with its land "should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title."

102. *Id.* at 249.

103. See also *id.* at 247, where Lamer C.J. said that, if the occupancy necessary to establish Aboriginal title has been proven "by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group..., there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture" (emphasis added).

104. *Id.*

given above, what would be the result if the Aboriginal society changed so that hunting ceased to be culturally significant, and *then* decided to strip-mine lands that were formerly used for hunting? Is there any reason why the limitation that would have existed while the lands were hunting grounds should continue to apply? To maintain the limitation in those circumstances would seem to impose the kind of "legal strait-jacket" that Lamer C.J. was at pains to avoid.<sup>105</sup> This problem relates to a larger issue that he avoided as well, namely that of self-government, which we will come back to in Parts 2 and 3 of this article.

On the other hand, the inherent limitation may not be as great a barrier to changes in Aboriginal use as the above examples suggest. While cautioning against the application of "traditional real property rules" to Aboriginal title, Lamer C.J. suggested that

a useful analogy can be drawn between the limit on aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit "wanton or extravagant acts of destruction" ... or "ruin the property".... This description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.<sup>106</sup>

This waste analogy is in keeping with the communal nature of Aboriginal title and a common Aboriginal perspective that land does not belong just to the living members of the community, but to future generations as well.<sup>107</sup> There is thus an obligation to maintain the land, which may in fact prevent it from being used for strip-mining or clear-cutting. However, this would not prevent Aboriginal communities from engaging in mining and forestry on their lands in more environmentally respectful ways that do preserve the lands for future use and enjoyment.

After dealing with the issue of content of Aboriginal title, Lamer C.J. turned to the matter of proof. He laid down three criteria that must be satisfied to make out a claim to Aboriginal title:

- (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a

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105. See *id.* at 258, where Lamer C.J. said that a change in the nature of occupation "would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals."

106. *Id.* at 248.

107. See, e.g., Leroy Little Bear, *Aboriginal Rights and the Canadian "Grundnorm"*, in J. RICK PONTING, ed., *ARDUOUS JOURNEY: CANADIAN INDIANS AND DECOLONIZATION* 243, 245 (1986).

continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.<sup>108</sup>

These criteria involve two significant modifications of the *Van der Peet* test where Aboriginal title is concerned. First, "the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy."<sup>109</sup> In other words, it is not necessary for the claimants to prove that their connection with the land is integral to their distinctive culture, as proof of occupation suffices to establish that connection. Lamer C.J. put it this way:

in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.<sup>110</sup>

On what amounts to occupation, Lamer C.J. indicated that the dual source of Aboriginal title requires that both the common law and Aboriginal perspectives be taken into account. From the common law perspective, physical presence on and use of land is proof of occupation. He elaborated:

Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.... In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed."<sup>111</sup>

From the Aboriginal perspective, their own practices, customs and traditions, including but not limited to their laws, can also be relied upon to establish occupation:

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108. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 253.

109. *Id.*

110. *Id.* at 257.

111. *Id.* at 256, quoting Brian Slattery, *Understanding Aboriginal Rights*, 66 CANADIAN BAR REVIEW 727, 758 (1987). Similarly, in evaluating Indian occupation in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835), Baldwin J., delivering the opinion of the Court, said that it "was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites." See also *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 345-46 (1941); *Northwestern Shoshone Indians v. United States*, 324 U.S. 335, 338-40 (1945); *Sac and Fox Tribe v. United States*, 383 F.2d 991, 998 (1967); *United States v. Seminole Indians*, 180 Ct. Cl. 375, 383-86 (1967).

As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>112</sup>

The second modification to the *Van der Peet* test in this context involves the time frame for proof of Aboriginal title. It will be recalled that for other Aboriginal rights the time for applying the integral to the distinctive culture test is the time prior to European contact.<sup>113</sup> Lamer C.J. pointed out that this time frame is inappropriate where Aboriginal title is concerned. Instead, he chose assertion of Crown sovereignty as the relevant date because "aboriginal title is a burden on the Crown's underlying title," and

the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.<sup>114</sup>

Lamer C.J. supported the Crown sovereignty time frame with two additional reasons. The first relates to his conclusion that the integral to the distinctive culture test for Aboriginal rights is subsumed by the requirement of occupancy for Aboriginal title. In his words,

aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans.<sup>115</sup>

The second reason is that,

from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture.<sup>116</sup>

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112. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 256.

113. See *supra* text accompanying note 55.

114. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 254; see also *Aboriginal Title and Aboriginal Rights*, *supra* note 75, at 128-34.

115. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 254.

116. *Id.*

However, while the trial judge in *Delgamuukw* had found, "and the parties did not dispute on appeal; that British sovereignty over British Columbia was conclusively established by the *Oregon Boundary Treaty* of 1846",<sup>117</sup> the date of Crown sovereignty is not so clear in some parts of Canada. Also, there is a difference between assertion and actual acquisition of sovereignty, though Lamer C.J. did not make that distinction. But by accepting 1846 as the date when sovereignty was "conclusively established" in British Columbia, he ignored earlier assertions of British sovereignty. In any case, as the Crown would not have acquired underlying title to land prior to actually acquiring sovereignty, the relevant date must be acquisition of sovereignty. Lamer C.J. may have thought it unnecessary to be more precise about this because he probably assumed that assertion and acquisition of sovereignty occur simultaneously.<sup>118</sup> However, this is not necessarily so, as the example of British Columbia itself demonstrates.<sup>119</sup>

Lamer C.J.'s Crown sovereignty time frame for proof of Aboriginal title leaves another important question unanswered as well. Large areas of Canada, especially in the Maritime provinces and southern Quebec and Ontario, were formerly French colonies.<sup>120</sup> As the claim in *Delgamuukw* related only to British Columbia, Lamer C.J. did not have to consider the date for proof of Aboriginal title in former French Canada. He nonetheless framed the principles for proof of that title in general terms, without limiting them to British Columbia or expressly excluding the parts of Canada that Britain had acquired from France. So are his references to assertion of sovereignty by the "Crown" limited to the British Crown, or should they be interpreted to include the French sovereign as well? In other words, in former French Canada is the date for the proof of occupation of land for Abo-

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117. *Id.* at 254-55.

118. A number of English cases have decided that the effectiveness of an assertion of sovereignty by the Crown cannot be questioned by the courts: see *The Fagernes* [1927] P. 311 (C.A.); *R. v. Kent Justices* [1967] 1 All E.R. 560 (Q.B.); *Post Office v. Estuary Radio* [1968] 2 Q.B. 740 (C.A.); *Adams v. Adams* [1970] 3 All E.R. 572 (P.D.A.). However, the applicability of these decisions in the context of acquisition of Crown sovereignty in Canada is questionable. See the *Ontario Boundaries Case* (1884, P.C.) in PROCEEDINGS BEFORE THE ... PRIVY COUNCIL ... RESPECTING THE WESTERLY BOUNDARY OF ONTARIO (1889), as discussed in KENT MCNEIL, NATIVE RIGHTS AND THE BOUNDARIES OF RUPERT'S LAND AND THE NORTH-WESTERN TERRITORY 26-33 (1982). For further critical commentary on this judicial deference to the executive, see works cited *infra* note 119.

119. For further discussion of this issue in relation to Crown sovereignty over Rupert's Land, which became part of Canada in 1870, see Kent McNeil, *Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have*, in DANIEL DRACHE AND ROBERTO PERIN, eds., NEGOTIATING WITH A SOVEREIGN QUEBEC 107 (1992); Mei Lin Ng, Convenient Illusions: A Consideration of Sovereignty and the Aboriginal Right of Self-Government 2-69 (1994) (unpublished LL.M. Thesis, York University, Osgoode Hall Law School).

120. On the extent of New France prior to its cession to Britain by the Treaty of Paris in 1763, see MCNEIL, *supra* note 118.

original title the date of British or French acquisition of sovereignty?

This complex question cannot be adequately addressed here. However, it is worth noting that in *Adams* and *Côté* Lamer C.J. held that, even if French law did not acknowledge Aboriginal rights in French Canada, the existence of those rights should be determined on the same basis as in the rest of Canada. In *Côté*, he said:

I do not believe that the intervention of French sovereignty negated the potential existence of aboriginal rights within the former boundaries of New France under s.35(1) of the *Constitution Act, 1982*. The entrenchment of aboriginal ancestral and treaty rights in s.35(1) has changed the landscape of aboriginal rights in Canada....

Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and protection of European colonizers....

The respondent's view [that there are no aboriginal rights in what was formerly French Canada], if adopted, would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncracies of colonization over particular regions of the country. In my respectful view, such a static and retrospective interpretation of s.35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*.<sup>121</sup>

However, in both *Adams* and *Côté*, Lamer C.J. applied the *Van der Peet* test to determine whether fishing had been integral to the distinctive cultures of the Aboriginal groups in question *at the time of contact with the French*. If the Supreme Court takes a similar approach to an Aboriginal title claim in former French Canada, then the time for proof of occupation will likely be the date of acquisition of French rather than British sovereignty.<sup>122</sup> On the other hand, in this context Lamer C.J. said in *Delgamuukw* that "aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between *the common law* and pre-existing systems of aboriginal law."<sup>123</sup> As the common law would not have applied before British acquisition of sovereignty at the earliest,<sup>124</sup> and

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121. *R. v. Côté* [1996] 3 S.C.R. 139, 174-75.

122. As with British sovereignty in other parts of Canada, the time when this occurred is by no means certain: see Brian Slattery, *Did France Claim Canada Upon "Discovery"?*, in J.M. BUMSTEAD, ed., *INTERPRETING CANADA'S PAST*, vol. I, BEFORE CONFEDERATION 2 (1986).

123. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 254 (emphasis added).

124. As Britain acquired French Canada by conquest and cession, by the rules of Imperial colonial law the common law generally would not have been received upon acquisition of British sovereignty, but would have had to be introduced. See *Blankard v. Galdy* (1693) Holt



French law may not have accorded title on the basis of occupation,<sup>125</sup> it may be more appropriate to use acquisition of British sovereignty, or even introduction of the common law, as the relevant time.<sup>126</sup>

With respect to the second requirement for proof of Aboriginal title, namely, continuity between present and pre-sovereignty occupation, Lamer C.J. was careful not to impose an unrealistic standard. He said that "[c]onclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title."<sup>127</sup> Moreover, proof of "an unbroken chain of continuity"<sup>128</sup> is not necessary:

The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purposes of s.35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land.<sup>129</sup>

On the third requirement of exclusivity of occupation, Lamer C.J. related it to the nature of Aboriginal title, which he described as "the right to *exclusive* use and occupation of land."<sup>130</sup> For there to be an exclusive right he said there must be proof of exclusive occupation:

Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.<sup>131</sup>

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K.B. 341 (K.B.); Privy Council Memorandum (1722) 2 P. Wms. 75 (P.C.); *Campbell v. Hall* (1774) Lofft 655 (K.B.); *Donegani v. Donegani* (1835) 3 Knapp 63, 85 (P.C.). This was purportedly done by the Royal Proclamation of 1763, but French law was re-introduced in civil matters by the Quebec Act, 14 Geo. III (1774), c.83.

125. The issue of whether Aboriginal title could exist under the French regime was left unresolved in *Adams and Côté*.

126. Note, however, that in *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 250, Lamer C.J. used the middle portion of the above-quoted passage from *Côté* to conclude that "the existence of a particular aboriginal right at common law is not a *sine qua non* for the proof of an aboriginal right that is recognized and affirmed by s.35(1).... The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s.35(1)."

127. *Id.* at 257.

128. *Id.* (quoting *R. v. Van der Peet* [1996] 2 S.C.R. 507, 557).

129. *Id.* (quoting *R. v. Côté* [1996] 3 S.C.R. 139, 175).

130. *Id.* at 258 (Lamer C.J.'s emphasis).

131. *Id.*

Proof of exclusivity, like proof of occupation, must take account of, and place equal weight on, common law and Aboriginal perspectives:

as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty.<sup>132</sup>

Moreover, exclusivity may be shown by proof of Aboriginal law, such as laws against trespass so that "the presence of trespassers does not count as evidence against exclusivity."<sup>133</sup> Another example Lamer C.J. gave was of Aboriginal laws or treaties that granted permission to other Aboriginal groups to use or reside temporarily on the claimed land, as that would reveal intention and capacity to control the land.<sup>134</sup>

Finally, Lamer C.J. said that exclusivity does not exclude the possibility of joint Aboriginal title, held by more than one Aboriginal group who shared exclusive occupation. This concept of shared exclusivity, which is "well-known to the common law", would apply in a situation, for example, where "two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's."<sup>135</sup>

While Lamer C.J.'s judgment in *Delgamuukw* did not resolve all the outstanding issues in relation to Aboriginal title, it did go a long way toward clarifying the content of that title, and specifying how it can be proved. Aboriginal title is a right of exclusive use and occupation of the land, for a broad variety of purposes which are not restricted to traditional and historic uses, but subject to the inherent limitation that the lands cannot be used in ways that are inconsistent with use and enjoyment by future generations. Aboriginal title can be established by proving exclusive occupation of lands at the time the Crown acquired sovereignty, by evidence of physical presence and use, and Aboriginal practices, customs and traditions, including laws, that reveal that the lands were exclusively occupied. Other significant matters dealt with in the judgment, which will only be touched on briefly in the next Part of this article, are federal and provincial

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132. *Id.*

133. *Id.* at 259

134. *Id.*

135. *Id.* Lamer C.J. supported this conclusion with *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), the only American case cited in his judgment. *See also* *Turtle Mountain Band v. United States*, 490 F. 2d 935, 944 (1974); *United States v. Pueblo of San Ildefonso*, 513 F. 2d 1383, 1394-95 (1975); *Strong v. United States*, 518 F. 2d 556, 561-62 (1975), *certiorari denied* 423 U.S. 1015 (1975).

powers over Aboriginal title, including the test for justification of legislative infringements of it. But as mentioned earlier, the vital issue of self-government, which was dealt with by the lower courts, was sent back to trial without any explicit directions from the Supreme Court. However, we will see in the next Part that there is some indication in Chief Justice Lamer's judgment that the Court may be willing to accept a properly-framed self-government claim.

## II. THE INHERENT RIGHT OF SELF-GOVERNMENT

While the question of whether the Aboriginal peoples of Canada have an inherent right of self-government has not been addressed directly by the Supreme Court of Canada,<sup>136</sup> lower courts have generally adopted a negative position when faced with the issue. For example, in *Attorney-General for Ontario v. Bear Island Foundation*, Steele J. of the Ontario Supreme Court said this:

Although it was the custom in Canada not to interfere with the internal affairs of a local band or to extinguish aboriginal rights except by treaties, there was no legal right of internal administration or self-government by the local band.... Hence, the Indian nations or bands were not sovereign and their aboriginal rights could be extinguished unilaterally by validly enacted legislation or treaties.<sup>137</sup>

In *Delgamuukw v. British Columbia*, McEachern C.J. delivered a particularly negative judgment at trial on the claim by the Gitksan and Wet'suwet'en to ownership of and jurisdiction over their territories. Regarding jurisdiction, which was the claimants' way of referring to their right of self-government, he said:

It is my conclusion that Gitksan and Wet'suwet'en laws and customs are not

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136. For arguments in favor of such a right, see ROYAL COMMISSION ON ABORIGINAL PEOPLES, PARTNERS IN CONFEDERATION: ABORIGINAL PEOPLES, SELF-GOVERNMENT, AND THE CONSTITUTION (1993) [hereinafter PARTNERS IN CONFEDERATION]; Kent McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, 19 QUEEN'S LAW JOURNAL 95 [hereinafter *Envisaging Constitutional Space*]. For a history of political efforts to achieve recognition of this right, see Kent McNeil, *The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments*, 7 WESTERN LEGAL HISTORY 113 (1994); see also Ng, *supra* note 119; BRUCE CLARK, NATIVE LIBERTY, CROWN SOVEREIGNTY: THE EXISTING ABORIGINAL RIGHT OF SELF-GOVERNMENT IN CANADA (1990).

137. (1984) 15 D.L.R.4th 321, 407, where Steele J. added the qualification that "[t]here may be some question as to Canada's unilateral power [to extinguish aboriginal rights] now in view of section 35 of the *Constitution Act*, 1982." His decision was affirmed on appeal, without reference to self-government: (1989) 58 D.L.R.4th 117 (Ont. C.A.); [1991] 2 S.C.R. 570. See also *Logan v. Styres* (1959) 20 D.L.R.2d 416 (Ont. H.C.).

sufficiently certain to permit a finding that they or their ancestors governed the territory according to aboriginal laws even though some Indians may well have chosen to follow local customs when it was convenient to do so.<sup>138</sup>

Moreover, even if the Gitksan and Wet'suwet'en were self-governing prior to European colonization, McEachern C.J. held that "the aboriginal system, to the extent it constituted aboriginal jurisdiction of [sic] sovereignty, ... gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems."<sup>139</sup> And if that was not enough to dispose of the claim, he went on to add that, at the moment the colony of British Columbia joined Canada in 1871, "all legislative jurisdiction was divided between Canada and the province and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts."<sup>140</sup>

McEachern C.J.'s conclusions regarding Gitksan and Wet'suwet'en laws and customs, along with other aspects of his decision, have been severely criticized for their ethnocentric bias.<sup>141</sup> While avoiding the more objectional features of his judgment, the majority of the British Columbia Court of Appeal nonetheless upheld his decision that any right of self-government the Aboriginal peoples of British Columbia may have had was extinguished by 1871 at the latest.<sup>142</sup> Macfarlane and Wallace J.J.A. both were of the opinion that the *Constitution Act, 1867*,<sup>143</sup> which applied to British Columbia when it joined Confederation in 1871, exhaustively distributed legislative powers between the federal and provincial governments, leaving no space for Aboriginal jurisdiction.<sup>144</sup> Macfarlane J.A. stated:

With respect, I think that the trial judge was correct in his view that when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws. In 1871, two levels of government were established in British Columbia. The division of governmental powers between Canada and the provinces left no room for a third order of government.<sup>145</sup>

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138. *Delgamuukw v. British Columbia* (1991) 79 D.L.R.4th 185, 449.

139. *Id.* at 453.

140. *Id.*

141. See CASSIDY, *supra* note 33; Ridington, *supra* note 76; Asch, *supra* note 76.

142. See generally Bob Freedman, *The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in Delgamuukw v. British Columbia*, 28 UNIVERSITY OF BRITISH COLUMBIA LAW REVIEW 49 (1994).

143. 30 & 31 Vict. (U.K.), c.3.

144. *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, per Macfarlane J.A. at 519-20, Wallace J.A. at 591-93.

145. *Id.* at 520.

Lambert and Hutcheon JJ.A. dissented on this issue. Lambert J.A. did not regard the self-government claim of the Gitksan and Wet'suwet'en as a claim to exercise exclusive or paramount legislative power within their territories, and so he found no inconsistency between the division of powers in the *Constitution Act, 1867*, and an Aboriginal right of self-government.<sup>146</sup> He thought that that right, which may have been diminished by acquisition of British sovereignty and introduction of the common law, continued before and after Confederation, and received constitutional protection as an Aboriginal right under section 35(1) of the *Constitution Act, 1982*.<sup>147</sup>

In his dissent on this issue, Hutcheon J.A. relied on the fact that, prior to 1880s, there had been no attempt to impose English or Canadian law on the Gitksan or Wet'suwet'en. Moreover, attempts to do so from then on were generally unsuccessful in suppressing the Feast, which continues to be the principal means through which governmental authority is exercised by those peoples.<sup>148</sup> Hutcheon J.A. concluded that, while the right of self-government (or self-regulation, as he preferred to call it) has been affected by federal and provincial legislation, it has never been clearly and plainly extinguished, and so is now protected by section 35(1) of the *Constitution Act, 1982*.<sup>149</sup>

Macfarlane and Wallace JJ.A. have been criticized for their failure to apply the "clear and plain" test for extinguishment of Aboriginal rights before concluding that no Aboriginal right of self-government survived British Columbia's entry into Canada, especially when they endorsed and applied that test in the context of Aboriginal land rights, as they were compelled by precedent to do.<sup>150</sup> It has also been pointed out by the Royal Commission on Aboriginal Peoples that the approach taken by Macfarlane and Wallace JJ.A. "confuses the question of the *scope* of federal and provincial powers with the question of the *exclusiveness* of those powers."<sup>151</sup> The Commission argued convincingly that distribution of governmental powers by the *Constitution Act, 1867*, did not extinguish Aboriginal rights of self-government, as that distribution, even if comprehensive, would have left room for Aboriginal governments to exercise *concurrent* powers.<sup>152</sup> To this can be added the argument, to be developed in more de-

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146. *Id.* at 727.

147. *Id.* at 728-30.

148. See *Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia* [1988] 1 CANADIAN NATIVE LAW REPORTER 17 [hereinafter *Address of the Gitksan and Wet'suwet'en*].

149. *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, 762-64.

150. See Bruce Ryder, *Aboriginal Rights and Delgamuukw v. The Queen*, 5:2 CONSTITUTIONAL FORUM 43, 45-46 (1994). For the relevant precedents, see *supra* note 34.

151. PARTNERS IN CONFEDERATION, *supra* note 136, at 32 (emphasis in original).

152. *Id.* at 32-36. The Commission supported this argument by pointing out that in 1867 fed-

tail below, that the communal nature of Aboriginal rights necessitates a right of self-government to distribute and regulate those rights within the community.

While the Supreme Court of Canada has not yet ruled on the existence of an Aboriginal right of self-government, it was willing to *assume* that such a right can exist in its recent decision in *R. v. Pamajewon*.<sup>153</sup> That case involved a claim by two Ojibwa groups in Ontario, the Shawanaga and Eagle Lake First Nations, that they have an inherent right of self-government, which includes a right to regulate gambling activities on their reserves. They argued that they are therefore exempt from federal laws relating to gambling, as their right of self-government is constitutionally protected by section 35(1) of the *Constitution Act, 1982*.

Lamer C.J., whose judgment was concurred in by the rest of the Court except L'Heureux-Dubé J. (she delivered a short judgment of her own, concurring in result), started by "[a]ssuming without deciding that s.35(1) includes self-government claims."<sup>154</sup> In so far as they are included under that section, he said that those claims "are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard."<sup>155</sup> That standard is the *Van der Peet* test.<sup>156</sup>

The first element of the *Van der Peet* test is identification of the right claimed. The appellants in *Pamajewon* wanted the Court to "characterize their claim as to 'a broad right to manage the use of their reserve lands'".<sup>157</sup> Lamer C.J. rejected this characterization, as it would

cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.<sup>158</sup>

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eral and provincial legislative powers were not in fact exclusive, as the British Parliament retained general legislative authority over Canada until enactment of the Statute of Westminster, 1931, 22 Geo. V (U.K.), c.4. Moreover, the Canadian Parliament acknowledged in legislation that Indian tribes had some authority that could be exercised "according to their rules": An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, S.C. 1868, c.42, s.8. The Commission's position is also consistent with American law, which has acknowledged the continuing sovereignty of the Indian tribes, while according Congress concurrent jurisdiction over them: see COHEN'S HANDBOOK, *supra* note 1, at 217-20, 229-41.

153. [1996] 2 S.C.R. 821. For commentary, see Bradford W. Morse, *Permafrost Rights: Aboriginal Self-Government and the Supreme Court in R. v. Pamajewon*, 42 MCGILL LAW JOURNAL 1011 (1997).

154. *R. v. Pamajewon* [1996] 2 S.C.R. 821, 832.

155. *Id.* at 832-33.

156. See *supra* text accompanying notes 52-62.

157. *R. v. Pamajewon* [1996] 2 S.C.R. 821, 834.

158. *Id.* See also *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 266.

He accordingly characterized their claim as a claim to "the right to participate in, and to regulate, high stakes gambling activities on the reservation."<sup>159</sup> If applied to all self-government claims, this narrow approach to identification of the claimed right will effectively close the door to broadly-based Aboriginal jurisdiction over a range of activities in a modern-day context. Inherent self-government rights, even if accepted by the Court, will have to be established on an item-by-item basis, in accordance with the claimant group's specific history and culture.

The effect of this narrow approach is revealed by Lamer C.J.'s application in *Pamajewon* of the second element of the *Van der Peet* test, by which it must be determined whether or not the activity in question was integral to the distinctive culture of the Aboriginal people claiming the right. Looking at the evidence, he found that, while it demonstrated that the Ojibwa gambled prior to European contact, it did not show that gambling was of central significance to them. Moreover, the evidence did not reveal that gambling was regulated by the Ojibwa historically. Also, gambling was informal and small-scale; it was not the sort of large-scale activity the appellants were claiming a right to engage in and regulate. Lamer C.J. expressly agreed with the observation of Flaherty Prov. Ct. J. at trial that

commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which those societies were traditionally sustained or socialized.<sup>160</sup>

Lamer C.J. therefore concluded that the appellants had failed to meet the *Van der Peet* test by proving that participation in and regulation of high-stakes gambling were integral to their distinctive culture prior to European contact.

The *Pamajewon* decision shows not only how restrictive the Supreme Court's approach is to the identification of Aboriginal rights (apart from Aboriginal title), but also the degree of continuity that must be shown between pre-contact and present-day practices, customs and traditions. It is not enough for an Aboriginal people to have gambled - it appears that they must have engaged in gambling activities of the sort or on the scale of the gambling they claim to have a right to participate in. Moreover, there is a distinction here between an Aboriginal right to gamble, and a right of self-government in relation to gambling. To have the former, an Aboriginal people must have engaged in similar gambling historically, but to have the latter apparently they must go further and prove as well that they regulated that gambling. The hurdles and pit-falls confronting an Aboriginal people

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159. *R. v. Pamajewon* [1996] 2 S.C.R. 821, 833. Compare per L'Heureux-Dubé J. at 837-38, where she disagreed with Lamer C.J. and characterized the claim as "an existing Aboriginal right to gamble" (her emphasis).

160. Quoted *id.* at 835.

who want to establish even a very limited right of self-government over a specific activity therefore appear to be formidable.

I nonetheless think the *Pamajewon* decision is distinguishable where a claim is made to a right of self-government over Aboriginal lands and resources. It was argued in the Ontario Court of Appeal in that case that "the right to self-government existed either as an incident to aboriginal title in the reserve land or as an inherent aboriginal right."<sup>161</sup> Because of the way Lamer C.J. characterized the claimed right in the Supreme Court, he dealt only with the inherent right argument, not with the Aboriginal title argument. However, the title argument was dealt with in the Court of Appeal by Osborne J.A., who delivered the unanimous judgment. Relying on Macfarlane and Wallace J.J.A.'s judgments in *Delgamuukw*,<sup>162</sup> he concluded that the Aboriginal title to the reserve lands could not "be reasonably viewed so as to give rise to the broad aboriginal right to manage the use of their land asserted by the appellants. The aboriginal right, in my opinion, must be looked at more narrowly; it is activity and site specific."<sup>163</sup> Osborne J.A. limited Aboriginal title, even where reserve lands are concerned, to "rights which are integral to, or connected with, traditional aboriginal practices, and land use."<sup>164</sup> He accordingly dismissed the Aboriginal title argument, as there was "no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were [sic] part of the First Nations' historic cultures and traditions, or an aspect of their use of their land."<sup>165</sup>

With all due respect, Osborne J.A. misapplied Macfarlane and Wallace J.J.A.'s judgments, as they did not include reserve lands in their analyses of Aboriginal land rights.<sup>166</sup> Moreover, his views on the nature of

161. *Id.* at 830. See *R. v. Pamajewon and Jones* (1994) 120 D.L.R.4th 475 (Ont.C.A.).

162. See *supra* text accompanying notes 38-42.

163. *R. v. Pamajewon and Jones* (1994) 120 D.L.R.4th 475, 491. Note that the Crown did not dispute the existence of the Shawanaga and Eagle Lake First Nations' Aboriginal title to their reserve lands: *id.* at 487.

164. *Id.* at 490.

165. *Id.* at 491.

166. In his discussion of "Ownership", which he dealt with separately from "Aboriginal rights", Macfarlane J.A. accepted the trial judge's finding that the Gitksan and Wet'suwet'en had not established "the requisite exclusive possession of land to make out their claim for ownership *except in locations already within reserves*": *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, 499 (emphasis added). Wallace J.A. also dealt separately with "Aboriginal right of ownership of land" and "Aboriginal right of occupation and use of traditional lands - aboriginal title": *id.* at 581-86, 586-89. Under the first heading, at 582, he observed:

The trial judge, after considering the evidence, concluded that the interest of the plaintiffs' ancestors at the time of British sovereignty was, *except for village sites*, a non-exclusive use of a designated portion of the territory for aboriginal subsistence purposes.... *Since village sites were for the most part within the Indian Reserves and not subject to this litigation*, the trial judge declined to make any specific order regarding them. [emphasis added]



the Aboriginal title to reserve lands are inconsistent with the more recent decision of the Supreme Court of Canada in *Blueberry River Indian Band*, where the Indian interest in reserve lands was taken to include oil and gas, even though the Aboriginal people in question had made no use of those resources.<sup>167</sup> In the absence of statutory provisions to the contrary, the Indian interest in reserve lands generally entails all-encompassing rights of use and enjoyment, including all the resources on and under those lands.<sup>168</sup> As we have seen, this has now been affirmed by the Supreme Court of Canada in *Delgamuukw* with respect to all Aboriginal title lands, whether located within reserves or not, with the qualification that the lands cannot be used in ways that are inconsistent with use and enjoyment by future generations.<sup>169</sup>

There is, however, a distinction between direct use and enjoyment of the land itself, and other activities that might take place on the land, but would not normally be considered use of the land as such. Hunting and fishing, pasturing domestic animals, growing crops, extracting minerals, cutting timber, and the like would be direct uses of land. Constructing a house or other building might be thought of as a direct use as well, but every activity that took place inside that house or building would hardly be regarded as a use of the land itself.<sup>170</sup> For example, constructing a community center might be a direct use of land, but the various activities conducted there, which might include bingo, would at best be indirect uses.

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167. See *supra* note 92.

168. See McNeil, *supra* note 37, at 148-51.

169. See *supra* text accompanying notes 86-107.

170. This kind of distinction can be found in case law dealing with the authority of municipalities in relation to zoning and regulation of businesses. By-law making authority to license and regulate businesses does not include authority to control the use and esthetic appearance of land, as these are separate legislative functions. See *Re Cities Service Oil Co. and City of Kingston* (1956) 5 D.L.R.2d 126 (Ont. H.C.); *Texaco Canada v. Corporation of Vanier* [1981] 1 S.C.R. 254. Nor does authority to control the use of land through zoning permit regulation of businesses under the guise of zoning. See *Jensen v. Corporation of Surrey* (1989) 47 M.P.L.R. 192, 194, 196 (B.C.S.C.), where Spencer J. held that zoning authority can be used to "regulate within zones, the uses, siting, size and dimensions of buildings", but cannot be relied upon to control "how many people may participate in the use at a time without reference to siting, size or dimension," as that "purports to control the way in which the business is carried on within the premises" (emphasis added). I am grateful to Professor Toni Williams for her valuable assistance on this point. Moreover, Canadian jurisprudence relating to Indian reserves also supports this distinction. Under s.91(24) of the Constitution Act, 1867, 30 & 31 Vict. (U.K.), c.3, the Canadian Parliament has exclusive jurisdiction over "Indians, and Lands reserved for the Indians". As a result, provincial legislation relating to use and possession of lands cannot, of its own force, apply on reserves. See *Corporation of Surrey v. Peace Arch Enterprises* (1970) 74 W.W.R. 380 (B.C.C.A.); *Derrickson v. Derrickson* [1986] 1 S.C.R. 285; *Paul v. Paul* [1986] 1 S.C.R. 306. However, a business conducted in a building on a reserve, such as manufacturing shoes, can be subject to provincial legislation, as the running of the business is not a direct use of the land as such, and so is not within exclusive federal jurisdiction. See *Four B Manufacturing v. United Garment Workers of America* [1980] 1 S.C.R. 1031.

This distinction between direct and indirect land use provides the means of limiting the impact of *Pamajewon*. The appellants argued in the Court of Appeal that their right of self-government was an incident of their Aboriginal title, and included jurisdiction to regulate economic activities, such as gambling, on their reserve lands.<sup>171</sup> But as we have seen, Osborne J.A. held that their Aboriginal title did not provide them with an Aboriginal right to conduct gambling because there was "no evidence to support a conclusion that gambling generally ... [was] *an aspect of their use of their land*."<sup>172</sup> However, nothing in Osborne J.A.'s judgment, nor in the decision of the Supreme Court of Canada, denies Aboriginal peoples a right of self-government over activities that *are* aspects of their Aboriginal rights of use and enjoyment of their lands. It is in this context that the distinction made above between direct and indirect land use is relevant. Gambling is at best an indirect use of the land, and so is not an incident of Aboriginal title; according to Osborne J.A., jurisdiction over it therefore cannot be claimed by virtue of that title.<sup>173</sup> But as the Supreme Court of Canada held in *Delgamuukw*,<sup>174</sup> direct uses of the land, which would include utilization of wild game and fish, pasturing of domestic animals, agriculture, extraction of natural resources, constructing buildings, and so on, can be incidents of Aboriginal title, and so they should support a right of self-government over those activities.

It might, however, be argued that an Aboriginal title which includes a right to engage in those kinds of direct uses of the land does not necessarily entail governmental powers over those uses. Following this argument, to have a right of self-government with respect to those uses the Aboriginal claimants would have to go further and prove that their ancestors regulated those activities.<sup>175</sup> In my opinion, the fallacy in this argument is that it fails to take account of Aboriginal title's communal nature. Canadian courts, including the Ontario Court of Appeal in *Pamajewon*,<sup>176</sup> have consistently held that Aboriginal rights generally, and Aboriginal land rights in particular, are communal.<sup>177</sup> While exercisable by individuals, they are vested

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171. *R. v. Pamajewon and Jones* (1994) 120 D.L.R.4th 475, 487.

172. *Id.* at 491 (emphasis added).

173. However, this would not preclude a claim to an Aboriginal right to gamble as a free-standing Aboriginal right. See discussion of *Adams and Côté* *supra* text accompanying notes 78-83. An Aboriginal right of self-government in relation to that right could also be established, in accordance with the Supreme Court's decision in *Pamajewon*, if it were proven that the Aboriginal people in question not only participated in but also regulated gambling prior to European contact.

174. See *supra* text accompanying notes 84-107.

175. Recall that in *Pamajewon* Lamer C.J. intimated that, to have a right of self-government over gambling, an Aboriginal people would have had to both participate in and regulate gambling. See *supra* text accompanying notes 160-61.

176. *R. v. Pamajewon and Jones* (1994) 120 D.L.R.4th 475, 488.

177. See, e.g., *Pasco v. Canadian National Railway Co.*, *sub nom.* *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989) 56 D.L.R.4th 404, 410 (B.C.C.A.); *R. v. Spar-*

in an Aboriginal community as a whole. In *Delgamuukw*, Lamer C.J. not only affirmed the communal nature of Aboriginal title, but also linked it to community control over Aboriginal land:

A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. *Decisions with respect to that land are also made by that community.* This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.<sup>178</sup>

By attributing decision-making power over their lands to Aboriginal nations, Lamer C.J. implicitly acknowledged their right of self-government with respect to Aboriginal title. Indeed, the collective nature of communal rights *necessitates* rule-making bodies and processes for distributing and regulating the rights within the community. There must, for example, be rules and mechanisms for deciding which members of the community can use which lands, and for what purposes. The communal nature of Aboriginal rights therefore presupposes the existence of Aboriginal governments to distribute the benefits that flow from those rights within the community, and to regulate how they are exercised.<sup>179</sup>

Historically, the Aboriginal peoples had governments which performed these kinds of functions.<sup>180</sup> This was acknowledged by Lamer C.J. in *Delgamuukw*.<sup>181</sup> Those governments cannot have been legally disem-

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row [1990] 1 S.C.R. 1075, 1112; *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, per Macfarlane J.A. at 495, Hutcheon J.A. (dissenting in part) at 756; compare per Lambert J.A. (dissenting in part) at 648.

178. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 242 (emphasis added). On the communal nature of Aboriginal title, compare the position in the United States, where the Supreme Court has held that individuals are capable of holding Indian title. See *Cramer v. United States*, 261 U.S. 219, 227-29 (1923); *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 345-46 (1941); *United States v. Dann*, 470 U.S. 39, 50 (1985).

179. Where Indian reserves are concerned, this need has been met (however inadequately and inappropriately) by federal legislation in the form of the Indian Act, R.S.C. 1985, c.I-5, providing for band councils which have limited powers to allocate reserve lands to band members and regulate use of those lands. However, no such provision has been made with respect to Aboriginal title lands that lie outside reserves.

180. See *Address of the Gitksan and Wet'suwet'en*, *supra* note 148; Tom Porter, *Traditions of the Constitution of the Six Nations*, in LEROY LITTLE BEAR, MENNO BOLDT AND ANTHONY LONG, eds. *PATHWAYS TO SELF-DETERMINATION: CANADIAN INDIANS AND THE CANADIAN STATE* 14 (1984); Michael Coyle, *Traditional Indian Justice in Ontario: A Role for the Present?* 24 *OSGOODE HALL LAW JOURNAL* 605 (1986). As stated in *REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA*, vol. 2, 18 (1991), "Aboriginal peoples have always had governments, laws and some means of resolving disputes within their communities."

181. In his judgment, he referred both to Aboriginal laws, which might include "a land tenure system or laws governing land use", and to an "aboriginal system of governance": *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 256, 260.

powered at some magic moment in the past, when the British Crown acquired sovereignty or the Dominion of Canada was created, as the majority of the British Columbia Court of Appeal concluded in *Delgamuukw*.<sup>182</sup> As the communal rights of the Aboriginal peoples continued after colonization and Confederation,<sup>183</sup> the structures and processes for distributing and regulating those rights must have continued as well. Otherwise, there would have been legal chaos within Aboriginal communities.

This can be illustrated by a hypothetical example. Let us suppose an Aboriginal nation that relied heavily on fish for food had formulated laws, prior to European colonization, for determining who could fish where, what kinds and quantities of fish could be taken, and so on. Those laws were subject to change by the nation, as its needs and the variety and supply of fish changed, by the exercise of what Europeans would regard as legislative authority. The laws were administered and enforced by mechanisms established by the nation, amounting to the exercise of executive and judicial authority.<sup>184</sup> When the Europeans arrived, the communal right of this people to take fish for food would have continued.<sup>185</sup> But if the governmental authority of the nation was extinguished,<sup>186</sup> the internal legal means of changing the laws in relation to those rights and their exercise, and of administering and enforcing them, would have disappeared as well, as there would have been no way to exercise legislative, executive and judicial authority within the Aboriginal community. What would be the result? In theory, the laws in existence at the time of European colonization probably would have continued,<sup>187</sup> but given that there would be no internal legal authority for changing, administering or enforcing them, in practice no one would have to abide by them.<sup>188</sup> The result would be legal

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182. See *supra* text accompanying notes 142-45.

183. See *Guerin v. The Queen* [1984] 2 S.C.R. 335, 376-79; *Roberts v. Canada* [1989] 1 S.C.R. 322, 340; *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 242.

184. This is not to suggest that Aboriginal governments would function in ways familiar to Europeans, or could necessarily be divided into legislative, executive and judicial branches. The differences between indigenous North American and European political philosophies and systems of government are generally profound. See Menno Boldt and J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians*, 17 CANADIAN JOURNAL OF POLITICAL SCIENCE 537 (1984); Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems*, 10 AMERICAN INDIAN QUARTERLY 191 (1986). However, regardless of divergence in philosophies and structures, Aboriginal governments would still perform broad functions of distributing and administering entitlements and resolving conflict within Aboriginal communities. See *supra* text accompanying notes 180-81.

185. See *R. v. Sparrow* [1990] 1 S.C.R. 1075; *R. v. Adams* [1996] 3 S.C.R. 101; *R. v. Côté* [1996] 3 S.C.R. 139.

186. Recall that the majority of the British Columbia Court of Appeal in *Delgamuukw* thought that this occurred by the time of Confederation at the latest. See *supra* text accompanying notes 142-45.

187. See Walters, *supra* note 22.

188. Note that external enforcement of Aboriginal laws by Canadian courts would be a possibility, and has in fact occurred in family matters such as marriage and adoption. See, eg., Con-

chaos within the community, a result which the Supreme Court of Canada, in a different context, was willing to bend over backwards to avoid by temporarily suspending a provision of the Canadian Constitution.<sup>189</sup> One would expect the Court to make as great an effort to avoid legal chaos in Aboriginal communities, especially since no suspension of constitutional provisions would be involved.<sup>190</sup>

Lamer C.J. acknowledged in *Van der Peet* that the pre-existing laws and customs of the Aboriginal peoples were not extinguished by European colonization or the creation of Canada. In this context, he quoted a passage from Brennan J.'s judgment in the High Court of Australia in *Mabo v. Queensland [No. 2]*, containing the following statement: "*Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.*"<sup>191</sup> Lamer C.J. expressly approved of this statement:

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nolly v. Woolrich (1867) 17 R.J.R.Q. 75, 82 (Que. S.C.), *affirmed sub nom.* Johnstone v. Connolly (1869) 17 R.J.R.Q. 266 (Que. Q.B.); Re Kitchooalik and Tucktoo (1972) 28 D.L.R. 3d 483 (N.W.T.C.A.); Re Wah-Shee (1975) 57 D.L.R.3d 743 (N.W.T.S.C.); and discussion in Norman K. Zlotkin, *Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases* [1984] 4 CANADIAN NATIVE LAW REPORTER 1. However, given general lack of judicial knowledge of and respect for Aboriginal laws (for a striking example, see *R. v. St. Catharines Milling and Lumber Co.* (1885) 10 O.R. 196 (Ont. Ch.), commented on in works cited *supra* note 7), and the fact that there was little attempt to assert jurisdiction of Canadian courts in Aboriginal communities until well into the nineteenth, and in some regions the twentieth, centuries (see *infra* notes 226-29 and accompanying text), this would not be a realistic solution to the legal disruption in Aboriginal communities. Another possibility would be clandestine social enforcement, a fictional instance of which was depicted by Anna Lee Walters, *Laws, in THE SUN IS NOT MERCIFUL* 91 (1985).

189. See Reference Re Manitoba Language Rights [1985] 1 S.C.R. 721, where the Court invoked the fundamental principle of the rule of law to suspend the operation of a provision of the Manitoba Act, 1870, S.C. 1870, c.3, s.23, requiring that Manitoba statutes be enacted in French as well as English, for a sufficient time for them to be translated and re-enacted in both languages.

190. See PARTNERS IN CONFEDERATION, *supra* note 136, where it is argued that an inherent Aboriginal right of self-government is not only compatible with, but is also recognized by, the Constitution. See also CLARK, *supra* note 136.

191. (1992) 175 C.L.R. 1, 58, *quoted in* *R. v. Van der Peet* [1996] 2 S.C.R. 507, 545 (Lamer C.J.'s emphasis). Note that Brennan J.'s statement has sometimes been misinterpreted to mean that Native title *as against the Crown* depends on the laws and customs of the indigenous people in question. This is clearly not what he meant, as the High Court in *Mabo* declared that the Meriam people (the indigenous claimants in the case) as a community "are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands," even though Moynihan J. had found as a matter of fact, and the High Court did not question, that "there was apparently no concept of public or general community ownership among the people of Murray Island, all the land of Murray Island being regarded as belonging to individuals or groups": 175 C.L.R. 1, per Brennan J. at 22. See also per Toohey J. at 191, where he observed that "the findings of Moynihan J. do not allow the articulation of a precise set of rules," but went on to conclude that that did not matter, as "the particular nature of the rules which govern a society or which describe its members' relationship with land does not determine the question of traditional land rights." In fact, the High Court appears to have based

This position is the same as that being adopted here. "[T]raditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples.... To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.<sup>192</sup>

But in *Delgamuukw*, Lamer C.J. modified this by specifying that Aboriginal title is derived from exclusive occupation of land prior to acquisition of sovereignty by the Crown.<sup>193</sup> In proving occupation, both a physical connection with the land and Aboriginal perspectives, expressed in part by Aboriginal laws, are relevant.<sup>194</sup> So while Aboriginal law can be used as evidence of exclusive occupation, the content of Aboriginal title is not determined by that law.<sup>195</sup> Instead, the occupation itself gives rise to a common law right of exclusive occupation and use, subject to the inherent limitation that the lands cannot be used in ways inconsistent with future use and enjoyment by the Aboriginal people in question.<sup>196</sup>

Lamer C.J.'s judgment in *Delgamuukw* therefore seems to limit the relevance of Aboriginal law, in the context of an Aboriginal title claim, to supporting the occupation upon which that title depends. However, that is only the *external* relevance of Aboriginal law, as against the Crown in relation to which the title is claimed. Within the Aboriginal community, Aboriginal laws relating to land would continue to have the same *internal* relevance and vitality as they would have had prior to acquisition of Crown sovereignty.<sup>197</sup> But for the continuance of those laws to be meaningful and effective, the mechanisms within the community for administering and enforcing them, and arguably for changing them, would have to continue as well.<sup>198</sup>

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the Native title of the Meriam people on their exclusive occupation of land: see per Brennan J. at 51-52. Compare *Wik Peoples v. Queensland* (1996) 141 A.L.R. 129 (H.C. Aust.). For more detailed discussion, see *Aboriginal Title and Aboriginal Rights*, *supra* note 75, at 138-44.

192. [1996] 2 S.C.R. 507, 546.

193. See *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 246, 253. This appears to be consistent with the actual decision in *Mabo*, if not with the above quotation: see *supra* note 191 and accompanying text.

194. See *supra* text accompanying notes 95-99, 111-12.

195. For further support for the latter point, see Slattery, *supra* note 111, at 745-48.

196. See *supra* text accompanying notes 94-134.

197. For further discussion, see Slattery, *supra* note 111, at 745; McNeil, *supra* note 37, at 153.

198. The necessity for maintaining the ability of an indigenous community to change its laws after British colonization was acknowledged by the Privy Council in the context of Maori customary adoption in *New Zealand in Hineiti Rirerire Arani v. Public Trustee* (1919), [1840-1932] N.Z.P.C.C. 1, 6:

A further argument supports the conclusion reached above that Aboriginal governments were not legally disempowered by European colonization and the creation of Canada, but instead retained broad authority to change, administer and enforce Aboriginal laws in relation to lands as a necessary consequence of the continuance of Aboriginal land rights. We have seen that Aboriginal rights were recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.<sup>199</sup> In *Van der Peet*, Lamer C.J. acknowledged, in the context of section 35(1), that "[a]boriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights."<sup>200</sup> This means that Aboriginal title was accorded constitutional protection in 1982 in those parts of Canada where it had not previously been extinguished.<sup>201</sup> This was confirmed in *Delgamuukw*, where Lamer C.J. stated that "Aboriginal title at common law is protected in its full form by s.35(1)."<sup>202</sup> As a consequence, it can no longer be extinguished,<sup>203</sup> at least without the consent of the Aboriginal titleholders. However, like other Aboriginal rights, it can still be regulated and infringed by federal (and possibly provincial<sup>204</sup>) legislation, but only if the legislation meets a strict test of justification.<sup>205</sup> The effect of this is to insulate Aboriginal rights,

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It may well be that ... the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi-legislative internal authority which can modify it.

It was accepted in *Mabo* as well that the laws and customs of an indigenous community in relation to land could be changed by the community after the acquisition of British sovereignty: *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1, per Brennan J. at 61, Deane and Gaudron JJ. at 110, Toohey J. at 192. As was recognized in *Hineiti Rirerire Arani*, this implies the continuance of some kind of legislative authority within the community, despite the refusal of Chief Justice Mason, sitting alone, to envisage that possibility in *Coe v. Commonwealth* (1993) 68 A.L.J.R. 110 (H.C. Aust.); see also *Walker v. New South Wales* (1994) 69 A.L.J.R. 111 (H.C. Aust.); *Thorpe v. Commonwealth of Australia* [No. 3] (1997) 71 A.L.J.R. 767 (H.C. Aust.). See generally HENRY REYNOLDS, *ABORIGINAL SOVEREIGNTY: REFLECTIONS ON RACE, STATE AND NATION* (1996).

199. See *supra* text accompanying note 36.

200. *R. v. Van der Peet* [1996] 2 S.C.R. 507, 540.

201. The words "existing aboriginal rights" in s.35(1) were interpreted to mean Aboriginal rights that had not been extinguished by "clear and plain" sovereign intent before the enactment of that provision. See *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1091-93, 1099.

202. *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 249.

203. See *R. v. Van der Peet* [1996] 2 S.C.R. 507, 538.

204. See *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 260-72. For commentary, see Kent McNeil, *Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction*, 61 SASKATCHEWAN LAW REVIEW 431 (1998).

205. This test was first laid down in *R. v. Sparrow* [1990] 1 S.C.R. 1075. It has since been applied by the Supreme Court in other cases. See *supra* note 36.

including Aboriginal title, from interference by non-Aboriginal governments, unless those governments can prove "a compelling and substantial [legislative] objective," and show that the interference is "consistent with the Crown's fiduciary obligation to aboriginal peoples."<sup>206</sup> As a general rule, this means that the objective should be met with as little impact on Aboriginal rights as possible.<sup>207</sup>

Application of the justificatory test to Aboriginal title means that non-Aboriginal governments are constitutionally barred from exercising the kind of control over Aboriginal lands that they exercise over non-Aboriginal lands. Any controls that infringe Aboriginal title will be invalid unless the test is met. As the onus of proof of justification is on the Crown, there is a presumption of invalidity that "may place a heavy burden on the Crown."<sup>208</sup> Section 35(1) therefore has the effect of creating a constitutional space for Aboriginal title and other Aboriginal rights that non-Aboriginal governments cannot easily invade.<sup>209</sup> Within that space, the rights vested in an Aboriginal community can be exercised relatively freely, without unjustified outside interference. But given that those rights are communal, for social harmony to be preserved the community has to have rules and mechanisms for their distribution and regulation. As discussed above, this necessitates Aboriginal governments. So constitutionalization of Aboriginal rights reinforces the need for Aboriginal governments by making the arguments in their favor all the more compelling.<sup>210</sup>

### III. THE TERRITORIAL RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Up to this point, I have accepted the basic paradigm that the courts have created for Aboriginal rights in Canada, and shown how one can work within that paradigm to establish broad land rights and find space for an inherent right of self-government. I now want to take another tack, and suggest that the approach the Canadian courts have been taking to Aborigi-

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206. R. v. Adams [1996] 3 S.C.R. 101, 133; see also R. v. Gladstone [1996] 2 S.C.R. 723, 762-63; R. v. Côté [1996] 3 S.C.R. 139, 189; Delgamuukw v. British Columbia (1997) 153 D.L.R.4th 193, 260-66.

207. See R. v. Sparrow [1990] 1 S.C.R. 1075, 1114-19; R. v. Gladstone [1996] 2 S.C.R. 723, 763-75. For a critique of the manner in which the justification test was applied in *Gladstone*, see Kent McNeil, *How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?*, 8:2 CONSTITUTIONAL FORUM 33 (1997).

208. See R. v. Sparrow [1990] 1 S.C.R. 1075, 1110, 1114, 1119 (quoted passage), 1121.

209. As Dickson C.J. and La Forest J. said in *Sparrow*, constitutional recognition of Aboriginal rights "gives a measure of control over government conduct and a strong check on legislative power." *Id.* at 1110.

210. For another slant on this argument, see *Envisaging Constitutional Space*, *supra* note 136, suggesting that s.35(1) of the Constitution Act, 1982, created a constitutional space for Aboriginal governments to operate and make laws regarding Aboriginal and treaty rights; to the extent that Aboriginal governments filled that space, federal and provincial laws infringing those rights would be excluded.



nal rights is too narrow. I am going to propose an alternative approach that goes beyond land rights and self-government, and acknowledges the limited territorial sovereignty of the Aboriginal peoples as nations within Canada. The main problem I see with the judicial decisions is that they tend to take a particularized approach to Aboriginal claims, especially to self-government claims. Except where Aboriginal title is concerned, Aboriginal peoples are being asked to establish very specific rights, one by one, on the basis of historical practices, customs and traditions. While I have suggested a way of limiting the effect of this narrow approach where Aboriginal title is established, it still forecloses the possibility of broadly-based governance rights stemming from the Aboriginal peoples' existence as independent nations prior to European colonization. The solution to this problem that I am going to outline tentatively here, and develop in future work, takes account of the reality of Aboriginal nationhood. It subsumes all Aboriginal rights, including land rights and self-government, under one all-encompassing right to territory. In so doing, it places Aboriginal assertions of sovereignty at the forefront as the primary issue to be addressed.

In *Van der Peet*, Lamer C.J. emphasized that the first thing to be taken into account in identifying and defining Aboriginal rights is the perspective of the Aboriginal people claiming the rights.<sup>211</sup> While this sounds like a laudable approach, in the context of self-government it appears to be mainly empty rhetoric. This is revealed in the *Pamajewon* decision, where we have seen that the Shawanaga and Eagle Lake First Nations claimed "a broad right to manage the use of their reserve lands".<sup>212</sup> Lamer C.J. disregarded their perspective on the nature of their rights in that case, and characterized the claimed right narrowly as a "right to participate in, and to regulate, high stakes gambling activities on the reservation."<sup>213</sup> If Lamer C.J. had taken the Aboriginal claimants' perspective seriously, he would have inquired into whether their Ojibwa ancestors had generally managed the use of their lands as an independent nation prior to European colonization, which would have involved the issue of Ojibwa sovereignty. By dismissing the claimants' perspective and particularizing their claim in the way he did, Lamer C.J. was able to avoid this fundamental issue.

I think that Lamer C.J.'s direction that the perspectives of the Aboriginal peoples must to be taken into account should be taken seriously.<sup>214</sup> Generally speaking, those perspectives are fundamentally opposed to the

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211. See *supra* text accompanying notes 56-57.

212. *R. v. Pamajewon* [1996] 2 S.C.R. 821, 834; see *supra* text accompanying note 157.

213. *Id.* at 833; see *supra* text accompanying notes 158-59.

214. Related to this is the assertion of Dickson C.J. and La Forest J. in *Sparrow*, made in the context of justification of legislative infringements of Aboriginal rights, that Aboriginal peoples should be treated "in a way ensuring that their rights are taken seriously." On the same page, they went on to say "that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians." See *R. v. Sparrow* [1990] 1 S.C.R. 1075, 1119.

particularized approach to Aboriginal rights that the Supreme Court took in *Pamajewon*. Rather than classifying and compartmentalizing the physical world and legal rights in the way Euro-Canadians tend to do, Aboriginal peoples generally have a more holistic world-view. Where their Aboriginal rights are concerned, this means that they generally would not distinguish land rights from self-government.<sup>215</sup> For them, the two are intimately connected and part of a larger whole, so any attempt to separate them distorts and diminishes their Aboriginal rights.<sup>216</sup> Combining Aboriginal land rights and self-government into an over-arching right to territory with a sovereign dimension, in the way I am suggesting, is, I think, consistent with this Aboriginal perspective, whereas Lamer C.J.'s particularized approach is not.

Conceptualizing Aboriginal rights in terms of a broad right to limited territorial sovereignty is also consistent with the history of European-Aboriginal relations in North America, a history that has been acknowledged by the highest courts on both sides of the Canadian-American border. Until 1871 in the United States and at least 1923 in Canada, a prominent feature of those relations was the making of treaties.<sup>217</sup> In *R. v. Sioui*,<sup>218</sup> the Supreme Court of Canada acknowledged the nation-to-nation quality of a treaty entered into between the Hurons of Lorette and the British in 1760. Referring to that historical period, Lamer J. (as he then was), delivering the unanimous judgment of the Court, observed:

We can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

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215. See, e.g., David Ahenakew, *Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition*, in MENNO BOLDT AND J. ANTHONY LONG, eds., *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* 24, at 24-25 (1985); Fred Plain, *A Treatise on the Rights of the Aboriginal Peoples on the Continent of North America*, id. 31, at 32-34; Peter Ittinuar, *The Inuit Perspective on Aboriginal Rights*, id. 47, at 47. Boldt and Long, id. at 319, observed: "The concepts of aboriginal rights and sovereign Indian self-government are considered by most Indian leaders to be virtually synonymous."

216. See REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES, vol. 2, *RESTRUCTURING THE RELATIONSHIP*, part 2, at 448-64 (1996). See also Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations", in *ABORIGINAL AND TREATY RIGHTS*, supra note 7, 208, at 214-18.

217. In the United States, the practice of making treaties was terminated in 1871 by the Appropriation Act, c.120, 16 Stat. 544, at 566, codified 25 U.S.C. § 71. See COHEN'S HANDBOOK, supra note 1, at 105-07, 127. In Canada, the last agreements that were called treaties by the Canadian Government were the Williams Treaties of 1923, but adhesions to existing treaties took place after that, and modern land claims agreements are really treaties by another name, as the following subsection of the Constitution Act, 1982, makes clear: "35.(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

218. [1990] 1 S.C.R. 1025.

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.<sup>219</sup>

Similarity in the United States, Marshall C.J. recognized in *Worcester v. Georgia* that the "Indian nations had always been considered as distinct, independent political communities."<sup>220</sup> He continued:

[t]he very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations [entered into mainly by the British Crown], and consequently admits their rank among those powers capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.<sup>221</sup>

Lamer J. cited *Worcester v. Georgia* in *Sioui*, but quoted a different passage:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: *she considered them as nations capable of maintaining relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.*<sup>222</sup>

The *Sioui* and *Worcester* decisions reveal judicial awareness of the actual circumstances in North America, and a willingness to take those

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219. *Id.* at 1052-53.

220. 31 U.S. (6 Pet.) 515, 559 (1832). *See also* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

221. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 560 (1832).

222. *R. v. Sioui* [1990] 1 S.C.R. 1025, 1054 (*quoting* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 548-49, Lamer C.J.'s emphasis). It is worth noting that, in *Delgamuukw*, Lamer C.J. again referred to the Aboriginal peoples as nations, both in past and present contexts: for a significant instance of this, in relation to his acknowledgement of their decision-making authority respecting Aboriginal lands, *see supra* text accompanying note 178. For other such references, *see* *Delgamuukw v. British Columbia* (1997) 153 D.L.R.4th 193, 227-28, 231-32, 234, 237, 239, 258-59, 265, 272-73.

circumstances into account when dealing with issues of Aboriginal rights. Marshall C.J. had lived through the American Revolution and the War of 1812 (he was born in 1755, on the eve of the Seven Years War), and knew perfectly well that the Indian nations could be "formidable enemies, or effective friends."<sup>223</sup> The European nations asserted sovereignty in North America by discovery,<sup>224</sup> but had little interest in, and were initially incapable of, interfering with the Indian Nations. Marshall C.J. was uncategorical about the British policy of non-interference in *Worcester*:

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.... [The king] purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.<sup>225</sup>

The same policy of non-interference was followed in British North America outside the Thirteen Colonies and in Canada, well into the nineteenth, and in some areas the twentieth, centuries.<sup>226</sup> For example, regarding Rupert's Land, the vast territory claimed by the British Crown and granted to the Hudson's Bay Company by Royal Charter in 1670, the Governor of that Company, Sir George Simpson, in testimony before the Select Committee of the British House of Commons on the Company's affairs in 1857, answered as follows:

[Mr. Grogan] What privileges or rights do the native Indians possess strictly

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223. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546 (1832).

224. Marshall C.J. held that discovery gave the discovering European nation a title "as against all other European governments", and that the rights of the original inhabitants "to complete sovereignty, as independent nations, were necessarily diminished". See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823). However, he clearly thought the Indian nations retained authority to govern themselves, as he admitted "their power to change their laws and usages": *id.* at 593. Moreover, he said that a "person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws": *id.* (emphasis added).

225. *Worcester v. Georgia*, 31 (6 Pet.) U.S. 515, 547 (1832).

226. See, e.g., Hamar Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, 21 MANITOBA LAW JOURNAL 343 (1992) (concluding that Imperial statutes extending the jurisdiction of the courts of Upper and Lower Canada to adjacent British territory did not make Aboriginal persons who were not employed by fur trading companies subject to English criminal law). On the virtual absence of Canadian jurisdiction in much of the North into the twentieth century, see RENÉ FUMOLEAU, *AS LONG AS THIS LAND SHALL LAST: A HISTORY OF TREATY 8 AND TREATY 11, 1870-1939*, 139 (1973); Sidney L. Harring, *The Rich Men of the Country: Canadian Law in the Land of the Copper Inuit, 1914-1930*, 21 OTTAWA LAW REVIEW 1 (1989); McNeil, *supra* note 119, at 119-20.

applicable to themselves? —[Simpson] They are perfectly at liberty to do what they please; we never restrain Indians.

[Grogan] Is there any difference between their position and that of the half-breeds? — [Simpson] None at all. They hunt and fish, and live as they please. They look to us for their supplies, and we study their comfort and convenience as much as possible; we assist each other.

[Lord Stanley] You exercise no authority whatever over the Indian tribes? —

[Simpson] None at all....

[Mr. Bell] Do you mean that, possessing the right of soil over the whole of Rupert's Land, you do not consider that you possess any jurisdiction over the inhabitants of that soil? — [Simpson] No, I am not aware that we do. We exercise none, whatever right we possess under our charter.

[Bell] Then is it the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites? — [Simpson] They are under our jurisdiction when crimes are committed upon the Whites, but not when committed upon each other; we do not meddle with their wars.<sup>227</sup>

Even in British Columbia, where the majority of the British Columbia Court of Appeal concluded in *Delgamuukw* that Gitksan and Wet'suwet'en governmental authority had been extinguished at the latest in 1871,<sup>228</sup> there appears to have been no real attempt to impose British or Canadian jurisdiction or law on those peoples prior to the 1880s. Up to then, as pointed out by Hutcheon J.A. in his dissent in that case, "only the tribal laws of the Indians [had] prevailed."<sup>229</sup>

In French Canada as well, prior to the cession of New France to Britain in 1763, it appears that the French authorities did not interfere with the

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227. *Minutes of Evidence*, at 91-92, in HOUSE OF COMMONS, REPORT OF THE SELECT COMMITTEE ON THE HUDSON'S BAY COMPANY (1857). Note that Simpson's response regarding the non-application of criminal law corresponds with the approach taken by the United States Supreme Court in *Ex parte Crow Dog*, 109 U.S. 556 (1883), where it was held that federal criminal law did not apply to acts committed by one Indian against another in Indian territory. The effect of that decision was reversed where serious crimes are concerned in 1885 by the Appropriations Act, c.341, 23 Stat. 362, at 385, codified 18 U.S.C. §§ 1153, 3242. See COHEN'S HANDBOOK, *supra* note 1, at 300-04; SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994).

228. See *supra* text accompanying notes 142-45.

229. Quoting from instructions issued by the Honourable A. Davie, Attorney-General of British Columbia, to the Superintendent of Provincial Police on July 16, 1888. See *Delgamuukw v. British Columbia* (1993) 104 D.L.R.4th 470, 762. For an illuminating account of the application of Anglo-Canadian homicide law to the Aboriginal peoples in British Columbia, see Hamar Foster, *The Queen's Law Is Better Than Yours: International Homicide In Early British Columbia*, in JIM PHILLIPS, TINA LOO, AND SUSAN LEWTHWAITE, eds., CRIME AND CRIMINAL JUSTICE, vol. 5 of ESSAYS IN THE HISTORY OF CANADIAN LAW, THE OSGOODE SOCIETY SERIES 41 (1994).

internal governance of the Indian nations living within the territories claimed by the French king. In *Connolly v. Woolrich*, a well-known but judicially-neglected case decided by the Quebec Superior Court in 1867, Monk J. observed:

Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion.<sup>230</sup>

Supporting Monk J.'s statement with historical documentation, at the end of an illuminating article on "French Sovereignty and Native Nationhood during the French Régime" Cornelius Jaenen concluded as follows:

On the international level, France like other European powers involved in colonization of America asserted her sovereign rights over a vast continental expanse. At the regional level, dealing with "independent" peoples, she refrained from interference with original territorial rights, customs, and mode of life. French laws since 1664 applied only to colonists and were not imposed on native inhabitants.<sup>231</sup>

My point is that the *Sioui* and *Worcester* decisions reflect the historical reality of French and British colonization of North America. Those European powers asserted sovereignty over the territories occupied by the Aboriginal nations, but did not interfere with their autonomy within those territories. What was being respected was not just land rights or limited governmental authority, but territorial sovereignty under the over-arching sovereignty of the French and British Crowns, and later the United States. Marshall C.J. made this perfectly clear in *Worcester*. Referring to congressional Acts passed to regulate trade and intercourse with the Indians, he said that those Acts

manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only ac-

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230. (1867) 17 R.J.R.Q. 75, 82, *affirmed sub nom.* Johnstone v. Connolly (1869) 17 R.J.R.Q. 266 (Que. Q.B.).

231. In J.R. MILLER, ed., *SWEET PROMISES: A READER ON INDIAN-WHITE RELATIONS IN CANADA* 38 (1991). See also W.J. Eccles, *Sovereignty-Association, 1500-1783*, 65 CANADIAN HISTORICAL REVIEW 475 (1984); RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815* (1991); *PARTNERS IN CONFEDERATION*, *supra* note 136, at 10-12.

knowledge, but guaranteed by the United States.<sup>232</sup>

He went on to liken the Indian nations to states which place themselves under the protection of a more powerful state, without surrendering their independence and their rights of self-government.<sup>233</sup> Applying these conclusions to the Cherokee nation, he said it "is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."<sup>234</sup>

Despite fluctuations in presidential, congressional and judicial respect for Indian territorial rights, the basic principle laid down in *Worcester* of Indian territorial sovereignty within the United States has been maintained by the Supreme Court.<sup>235</sup> In Canada, however, we have seen that the courts, while acknowledging that the Aboriginal peoples have land rights, have been reluctant to embrace the concept of self-government, let alone accept that the Aboriginal peoples have territorial rights with sovereign dimensions.<sup>236</sup> Lamer J.'s decision in *Sioui* moved toward the concept of Aboriginal territorial sovereignty, but his more recent decision in *Pamajewon* signals a disappointing retreat from that promising initiative. In *Van der Peet* and *Pamajewon*, the Supreme Court shifted its historical focus, from the relations between the Aboriginal peoples and the French and British Crowns that it began to take account of in *Sioui*, to the pre-contact practices, customs and traditions of the Aboriginal peoples themselves. But close to four hundred years of history cannot be so easily ignored. No Canadian court has yet come up with a convincing explanation of what happened to Aboriginal sovereignty, or how that sovereignty can be denied in light of the Indian treaties which Canada continued to sign after Confederation. While the Supreme Court was able to avoid these issues in its recent decision in *Delgamuukw*, they will not go away. One day, they will have to be addressed.

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232. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

233. *Id.* at 561.

234. *Id.*

235. See *supra* text accompanying note 1.

236. A notable exception is *Connolly v. Woolrich* (1867) 17 R.J.R.Q. 75, 84, where Monk J., relying on *Worcester*, held that acquisition of French and British sovereignty, and reception of their laws, did not abrogate "the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes."